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Supreme Court of the United States

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS, PETITIONER,

vs.

COUNTY OF ALLEGHENY

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA**

**PETITION FOR CERTIORARI FILED APRIL 18, 1961
CERTIORARI GRANTED JUNE 3, 1961**

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

**IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA**

Commonwealth of Pennsylvania,
County of Allegheny, ss.:

No. 2384—July Term 1958

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

[fol. 4]

PETITION FOR APPOINTMENT OF VIEWERS—Filed May 29, 1958

To the Honorable, The Judges of said Court:

The petition of Thomas N. Griggs respectfully represents:

First: That he was on May 31, 1952, and for some period of time prior and subsequent to said date, the owner of a certain tract of real estate in the Township of Moon, Allegheny County, Pennsylvania, described as follows:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the Macadam Road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West Five Hundred Twenty-three (523) feet to the center of a Macadam Road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half

(420- $\frac{1}{2}$) feet to a point; thence by the same North 26° 29' West Six Hundred Sixty-one and 14/100 (661.14) feet to a point; thence by the same North [fol. 5] 38° 31' West Three Hundred Fifty-seven and 84/100 (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North 54° 51' East Three Hundred Seventy and 93/100 (370.93) feet to a point; thence by the same North 47° 27' East Three Hundred Sixteen and one-half (316- $\frac{1}{2}$) feet to line of land now or formerly of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon a two-story stone dwelling house, a-frame dwelling house and outbuildings.

Second: The defendant owns certain real estate in said Moon Township upon which it erected, maintains and operates the Greater Pittsburgh Airport. The said Greater Pittsburgh Airport was opened for commercial use on, to wit, June 1, 1952, and has been in continuous use since that time as an air terminal for the transportation for hire of passengers and cargo by air carriers and will continue to be so used.

Third: The defendant has entered into a lease with each of the airlines using said airport whereby, for certain considerations unknown to plaintiff, the airlines are granted [fol. 6] the right of ingress and egress to and from said airport; said lessees of the defendant being the Trans World Airlines, Inc., Eastern Airlines, Inc., Northwest Airlines, Inc., Capital Airlines, The Allegheny Airlines, Lake Central Airlines and later the United Airlines and the American Airlines.

Fourth: The defendant erected and maintains necessary facilities of the Greater Pittsburgh Airport three (3) runways for airplanes, being the East-West runway, the Northeast-Southwest runway and the Northwest-South-

east runway. The Northeast-Southwest runway is so erected and maintained that it points directly towards plaintiff's premises described in Paragraph First hereof at a distance of about one-half mile therefrom.

Fifth: From the opening of the Greater Pittsburgh Airport for commercial use, to wit, June 1, 1952, the aircraft of the several airlines under certain weather conditions take off at the extreme Northeast end of the said Northeast-Southwest runway towards plaintiff's property, and, in landing, glide low over plaintiff's property in order to land at the extreme Northeast end of said runway.

Sixth: The aircraft of the several airlines landing upon or taking off from the Northeast runway, descend thereto or ascend therefrom over plaintiff's property below the [fol. 7] safe navigable airspace as fixed and established by the Civil Aeronautics Board pursuant to the Acts of Congress for such case made and provided and as concurred in by the Pennsylvania Aeronautics Authority. The said safe navigable airspace begins in rural areas, at five hundred (500) feet above the ground or above any building erected thereon, and in congested areas at one thousand (1000) feet therefrom.

Seventh: From the opening of the Greater Pittsburgh Airport and the beginning of the use of the Northeast-Southwest runway, to wit, June 1, 1952, there have been continued flights of aircraft over the aforesaid described property of plaintiff in landing at and taking off from the Greater Pittsburgh Airport. That said flights were and are below the safe navigable airspace as specified by the Civil Aeronautics Board, namely five hundred (500) feet, and were and are at low levels and close to the property aforesaid.

Eighth: That by reason of said low flights the property of the plaintiff was and is greatly damaged and depreciated in value; that the use and enjoyment of the property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest.

Ninth: The property of the plaintiff as herein described is within the "approach zone" as specified in the Zoning [fol. 8] Regulations of the defendant adopted January 4, 1954 by authority of the Airport Zoning Act of the Commonwealth of Pennsylvania 2 P.S. 1550-1563, which reads in part as follows:

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act, or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political subdivision within which the property or nonconforming (sic) is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law, under which political subdivisions are authorized to acquire real property for public purposes, such air right aviation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act."

Tenth: The property of the plaintiff is within the glide angle plane for the said Northeast-Southwest runway, which glide angle plane is in the "approach zone" and [fol. 9] is a trapezoidal plane; that is to say, the glide angle plane starts at the Northeast end of the paved portion of the Northeast-Southwest runway at a level of the paving and thence slopes upward at the rate of one (1) foot vertically for each forty (40) feet horizontally for such distance as may be within the limits of the so-called approach zone. The said glide angle plane as located on plaintiff's premises is below the "floor" of the navigable airspace as so prescribed by the Civil Aeronautics Board and concurred in by the Pennsylvania Aeronautics Authority. The center line of said glide angle plane is near the house erected thereon and that the bottom of said

plane is about fifteen (15) to thirty (30) feet above the chimney.

Eleventh: Immediately after the Greater Pittsburgh Airport was opened for commercial use, to wit, June 1, 1952, and the low flights over plaintiff's property began, the plaintiff, and other property owners in the area whose properties were similarly affected, made demand upon defendant to make just compensation for the damage either by agreement or by condemnation as provided for in the statute above quoted in part.

Twelfth: Defendant in response to such demand denied that it was or is liable for the damage caused by the low flights and has failed and refused to pass the necessary resolution for the condemnation of the avigation easements [fol. 10] necessary for egress and ingress to said airport with consequent payment of damages.

Thirteenth: The airlines likewise having denied liability, your plaintiff entered an action in equity at No. 1288 October Term, 1955 in the Court of Common Pleas of Allegheny County wherein he named the defendant County and the several airlines as parties defendant and made demand that said defendants be required to compensate for the damage or that the low flights over his property be enjoined.

Fourteenth: The aforesaid suit and companion suits of other property owners similarly affected have been before the Supreme Court of Pennsylvania on preliminary and procedural questions. While no final determination has been made of said suits and they are still pending, the Supreme Court has clearly stated that in those proceedings the Court of Common Pleas of Allegheny County sitting in equity cannot award damages consequential or otherwise for property taken, injured or destroyed as a necessary and unavoidable consequence of the construction and operation of the airport by Allegheny County for public use under statutory authority.

Fifteenth: The defendant in its Answer filed subsequent to the opinion of the Supreme Court entered May 23, 1955

at 382 Pa. page 38, asserts that the Greater Pittsburgh Airport is a public improvement constructed and maintained by defendant to provide airport and air transport facilities for the use of the general public and is one of the major facilities of the commercial and civilian transportation system of the United States, and is a major instrumentality in the commerce and postal system.

Sixteenth: The airlines serving the Greater Pittsburgh Airport, in their Answer filed after the opinion of the Supreme Court aforesaid, assert that to enable the public to have facilities for air transport of passengers and cargo, which facilities are necessary for the functioning of the airport, it is necessary that airplanes enter and leave the airport by passing through the airspace above the plaintiff's property below five hundred (500) feet.

Seventeenth: Defendant County likewise asserts that such flights over plaintiff's property below five hundred (500) feet are necessary for egress and ingress to said airport.

Eighteenth: That the dwelling house on said property was occupied by your petitioner and his family from 1944, and subsequent thereto, and that there are no other parties in interest.

Nineteenth: There are no liens or mortgages affecting plaintiff's property.

Twentieth: Based upon the aforementioned assertion of the defendant and the airlines serving the Greater [fol. 12] Pittsburgh Airport in their Answers filed in the said suit and the location of plaintiff's property on the glide angle of the Northeast runway of said Greater Pittsburgh Airport, plaintiff avers that as a necessary and unavoidable consequence of the operation of the Greater Pittsburgh Airport, the defendant, by reason of its right of eminent domain, has in fact appropriated for public use aviation rights or easements over and across plaintiff's property for the purpose of providing access to the airport by the planes of the airlines.

Wherefore your petitioner prays that your Honorable Court appoint a Board of Viewers in the manner provided by law and direct that:

1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport beginning on June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across plaintiff's property below the safe navigable airspace for the purpose of egress and ingress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of an avigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a court of final [fol. 13] jurisdiction in the case, such determination shall be conclusive upon the parties;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to your petitioner for the damage to his property arising out of such condemnation by the defendant.

And Your Petitioner Will Ever Pray, Etc.

Thomas N. Griggs, By William A. Blair, Attorney
in Fact.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT APPOINTING BOARD OF VIEWERS—
May 29, 1958

And Now, to wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee, as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and Acts of Assembly in such case made

and provided; View - Tuesday, June 24, 1958 - 10 A.M.
o'clock D.S.T., Returnable - First Monday, March, 1959;

And Further:

It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled to [fol. 14] collect damages described in the Petition for Appointment of Viewers; and

It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

It Is Therefore Ordered and Decreed:

1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning on June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of an avigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then [fol. 15] it shall ascertain and award just compensation to the plaintiff for the damage to his property arising out of such condemnation by the defendant.

By the Court, Weiss.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT INSTRUCTING BOARD OF VIEWERS—

June 19, 1958

And now, to-wit, this 19th day of June, 1958 it appearing to the Court that on May 29, 1958, this Court entered the following order:

"AND NOW, to wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and Acts of Assembly in such case made and provided. View Tuesday, June 24, 1958—10:00 A.M. Returnable 1st Monday in March, 1959.

"AND FURTHER

"It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled [fol. 16] to collect damages described in the Petition for Appointment of Viewers; and

"It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

"IT IS THEREFORE ORDERED AND DECREED:

"1. The Board of Viewers shall, in limine, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning June 1, 1952 with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in

fact an appropriation or "taking" by the defendant of an avigation easement over said property;

"2. After the litigation as to the determination of the question set forth in preceding Paragraph 1., is finally decided by the Board of Viewers, or by a court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

[fol. 17] "3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to the plaintiff for the damage to his property arising out of such condemnation by the defendant.

BY THE COURT

s/ WEISS, J."

and it further appearing to the Court that in order that there be a prompt adjudication of the matters in dispute that the proceedings follow the ordinary and usual course:

Now, therefore it is ordered and decreed that the Order entered May 29, 1958 be and the same is hereby vacated and it is further ordered and decreed that the following order be and the same is hereby entered:

There is hereby appointed by this Court from the members of the permanent Board of Viewers appointed by law Thomas P. Trimble, Thomas M. Conrad and Paul G. McAtee as viewers in the matter within mentioned, and the said viewers are hereby ordered and directed to meet upon the line of the improvement and view the same and the premises affected thereby on Tuesday, the 24th day of June, 1958, at 10:00 o'clock A.M., E.D.S.T.; to hold such meetings as are necessary and hear all parties and witnesses in relation thereto and decide and true report make [fol. 18] concerning all matters and things submitted in relation to which they are authorized to inquire as directed by Acts of Assembly in such cases made and provided; the said viewers to give all parties notice as required by

Acts of Assembly and rules of this Court, and file a report in this Court on or before the 1st Monday of March, 1959, unless the time is hereafter extended.

.....
Soffel & Duff, JJ.

By the Court

W.

IN THE COURT OF COMMON PLEAS

AMENDMENT TO PETITION FOR APPOINTMENT OF VIEWERS—
Filed January 15, 1959

To the Honorable, the Judges of Said Court:

And now, comes the petitioner, Thomas N. Griggs, and moves the Court that he may be permitted to amend Paragraph Twentieth of the Petition for Appointment of Viewers filed in the above proceeding to read as follows:

Twentieth: Based upon the aforementioned assertion of the defendant and the airlines serving the Greater Pittsburgh Airport in their Answers filed in the said suit and the location of plaintiff's property on the glide angle of the Northeast runway of said Greater Pittsburgh Airport, plaintiff avers that as a [fol. 19] necessary and unavoidable consequence of the operation of the Greater Pittsburgh Airport, the defendant, by reason of its right of eminent domain, for the purpose of providing access to the airport by aircraft of the airlines, has in fact appropriated for public use an easement or fee simple interest in the airspace over plaintiff's property necessary for such purpose.

Thomas N. Griggs, Petitioner.

IN THE COURT OF COMMON PLEAS

**ORDER OF COURT APPROVING AMENDMENT TO PETITION FOR
APPOINTMENT OF VIEWERS—January 16, 1959**

And now, to wit, this 16th day of January, 1959, the foregoing Petition to amend the original Petition for Appointment of Viewers having been presented in open Court, and hearing had thereon, and upon consideration thereof, the amendment is approved and ordered to be filed.

By the Court

W.

[fol. 20]

PROCEEDINGS BEFORE THE BOARD OF VIEWERS

Transcript of Testimony—Filed July 15, 1959

VIEWERS:

Thomas P. Trimble, Jr., Esquire
Thomas M. Conrad
Paul G. McAtee

APPEARANCES

William A. Blair, Esquire, David B. Fawcett, Esquire,
Counsel for plaintiff.

Maurice A. Louik, Esquire, John W. Mamula, Esquire,
Counsel for County of Allegheny.

HEARING DATE—January 26, 1959

OFFERS IN EVIDENCE

Mr. Blair: May I offer in evidence Deed for the purpose of showing title only, of Mabelle R. McMahon, widow, to Thomas N. Griggs, dated the 22nd day of January, 1945, covering certain property, as will later be described, in the Township of Moon, and recorded in Deed Book Volume 2827, page 386. If your Honors please, when we visited the Airport with the County and I believe Mr. Conrad was

also present, they made available to use there certain maps which I think are necessary in the determination of the various facts relating to the problem before this Court. We will offer this general map in evidence as Exhibit "B" which shows locations—

[fol. 21] Mr. Louik: If you tell us what date you are concerned with we will be able to furnish master plans as of prior dates.

Mr. Blair: I don't know that that is very material.

Mr. Louik: This is a master plan as of 1957.

Mr. Blair: Shows no change with respect to the northeast-southwest runway from the time the Airport opened?

Mr. Louik: That is right.

Mr. Blair: We offer in evidence Exhibit "C" which is a print showing the approach zone from the northeast runway and which includes the Griggs property as well as that of K. C. Gardner, each of which is located within the approach zone as shown on that map. This map also shows the elevations of the houses and the center line of the approach zone.

Mr. Fawcett: This map is marked as the approach zone and glide angle of the northeast runway and it is dated October 9, 1953.

Mr. Blair: I will offer this plan in evidence and it is agreed by Counsel for the County and the plaintiff that there has been no change in the glide angle or approach zone since the opening of the Airport for commercial purposes in June of 1952. We offer in evidence Exhibit "D" which is a sketch of the northeast glide angle from the end [fol. 22] of the northeast runway showing the glide angle over the Griggs property and ground elevation as well as the elevation of the house on the property. I asked for the Airport Zoning Ordinance. Do you have it?

Mr. Louik: If the Court please, we have all these papers available and we will bring them over upon request.

Mr. Trimble: The zone map as it is called as well as the zoning regulations.

Mr. Blair: I offer plaintiff's Exhibit "E" being an Airport Zoning Regulation of the County of Allegheny, Pennsylvania.

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Mr. Mamula: We object to the offer of the Airport Zoning Ordinance as being immaterial in connection with the present proceeding.

Mr. Trimble: There will have to be a further reason than immateriality. I am not going to sustain an objection on immateriality. You will have to be specific.

Mr. Mamula: Objected to for the reason that the Airport Zoning is not to be construed as a basis for the taking of any private property in and about the Airport insofar as the restrictions on use. It has no bearing in the proceeding before this Board.

Mr. Trimble: Might the zoning map which is part of the zoning regulations itself be construed as in any way, shape [fol. 23] or form fixing a metes and bounds over this property to such an extent that it might be considered an easement?

Mr. Mamula: The question of the type, the frequency and the number of flights that go over the property of the plaintiff is the issue at hand and whether such flights, the type, nature and their frequency constitutes a taking is, I think, the mandate to this Board to determine that only and not as to whether or not there is some restriction on use insofar as height or type of structure that can be erected on plaintiff's property, which is a separate and distinct principle. Isn't that what we are doing here—that the issue has been remanded to your Board to make certain findings that will determine the quantum of the take, the nature of the take, if any, over what property, and the date of the taking—all of which is to be the result of the compilation of data and testimony here so that you can tell the type, nature and the frequency of flight. Enacting an Ordinance doesn't constitute any of the elements—the factual elements that I understood this proceeding to embrace.

Mr. Trimble: Up to this moment. I am going to admit it and I will rule on it later. I want to see what has been done by the County.

Mr. Blair: I think the Board has a mandate from the Supreme Court to determine everything that has been done in connection with the Airport situation and the Zoning

[fol. 24] Ordinance is very pertinent to that as it assumes dominance over airspace within those zones as shown on the zoning map.

Mr. Trimble: I just let it in. We will rule later as to whether or not it is material.

Mr. Louik: I'd like to add one thing. The zoning regulations do only one thing. They limit certain uses and they limit the certain heights of structures. Now, if the plaintiff is intending that we took the property by reason of the adoption of the zoning regulations I think he is improperly before this Court. That would invalidate the zoning regulations and the proper procedure would have been an attack upon the zoning regulations. If that is not the basis then the uses—the limitation of the uses of this property has nothing to do with this case.

Mr. Blair: It does have directly because the zoning ordinance was issued for the purpose of providing safe access in and out of the Airport by the airplanes which use the Airport, and the County has undertaken to prescribe those regulations, what may or may not be done within those particular zones leading to the runways.

Mr. Louik: (This is no more pertinent than the City zoning regulations limiting the residences that may be so constructed. It is not an issue before this Board.

[fol. 25] Mr. Trimble: We may so find when we come to that point. We are not going to rule on it now.

Mr. Blair: I offer also as Exhibit "F" the zoning map of the Greater Pittsburgh Airport.

Mr. Mamula: We enter the same objection to the zoning map as we did to the zoning ordinance and for the same reason.

Mr. Trimble: I will rule later on it. We are going to get everything into this thing so we can have one hearing and one hearing only. The Board will make the rulings later.

Mr. Blair: If your Honors please, we asked the County to furnish lease agreements with the air lines relating to the use of the Airport.

Mr. Trimble: The County has informed the Board they would do it when they were requested and I am sure they will.

Mr. Blair: I ask that they be produced.

Mr. Louik: So as not to clutter up this record we have identical agreements with all of the air lines. Do you want us to bring all of the agreements or will one agreement be sufficient?

Mr. Blair: Was it a uniform agreement with all of them?

Mr. Louik: It is a uniform agreement with all of the air lines which were entered into either in June of 1952 or subsequently when the new air lines came and we have [fol. 26] a renewal of that agreement in '57. We can bring one agreement that was entered into in 1952 and follow it up with an agreement when it ran out in June of 1957.

Mr. Fawcett: Were the agreements for five year periods?

Mr. Louik: The air lines that were there.

(Off the record discussion.)

Mr. Blair: If your Honors please, we also ask to be produced at the present time the lease and agreement between the County and the Federal Government relating to the Airport the agreement as to the erection of the Airport, the contribution of the Government and whatever obligation the County assumed with regard to the operation of that Airport.

Mr. Louik: As I told Mr. Trimble, we have several hundred agreements with different agencies of the Federal Government and we have a number of grants and agreements. I still don't know exactly what you want.

Mr. Trimble: We are only talking about the flight of aircraft.

Mr. Louik: We have an agreement with the Air Force for the use of certain area of the Airport and we have what is known as a grant agreement. We have a number [fol. 27] of those whereby they have contributed certain funds to the County. They are all identical and we can bring over one.

Mr. Blair: Do you have a master agreement at the beginning or do they all show the obligation of the County?

Mr. Louik: Every time we request aid from the Federal Government there is a grant agreement and there are any number of those. They are all identical—a statutory form that the Federal Government has and we can bring those over.

Mr. Trimble: To what extent would they be material?

Mr. Blair: Under the Federal Airport Act which provides for aid by the Federal Government to municipalities in connection with the operation of the Airport it says the condition precedent to the approval of the Commissioner, or whatever the head of that department was in Washington, of a project under this chapter, the Administrator shall receive assurances in writing, satisfactory to him that all facilities of the Airport developed with Federal Aid and all those usable for the landing and take-off of aircraft will be available to the United States for military and naval aircraft in common with other aircraft—and there are obligations under that Act that are assumed when a municipality receives contributions or aid from the Federal Government.

[fol. 28] Mr. Louik: I would like to say this—we will bring them over, but I would like to call the Board's attention to the recent case handed down in California in connection with the Western Air Lines where it was specifically held by the Court of Appeals out there that any provision of the grant agreement of the Federal Government were not or could not be used by a private party in a case against the Airport or the Air Lines, but we will have a copy of these grant agreements here. We don't believe there is anything in that agreement that has a bearing on this case, but we will bring it in. We do have an agreement with the Air Force about the military planes. They have exclusive use of a certain portion of that field. We have basically two types of arrangements with the Federal Government. One is the grant agreement which is signed by any Airport that receives Federal aid. In addition, we have at the Greater Pittsburgh Airport something which they have only at a few Airports and that is we have a lease agreement with the Federal Government whereby they have exclusive use of a certain portion of the field at the Greater Pittsburgh Airport and they also have use in

common with all other users of the Airport the remaining portion of the field. That agreement was entered into back in 1945 or 1946, and it runs for some twenty-five years. I did not understand that Mr. Blair asked for that.

[fol. 29] Mr. Trimble: I would think he is talking of the way he would like to tie in that the County gets a grant from the United States and in partial consideration the County must not refuse admission to any military planes.

Mr. Blair: If you keep in mind that Airport legislation in Washington is to promote air travel, not for military alone, but for the public—they would have no inclination to contribute to the Greater Pittsburgh Airport to serve unless it was going to be used for the receiving of the public as well as the military and that Act so says. They'd never grant funds to a municipality only for the purpose of the military. They'd operate it themselves if that were the case.

Mr. Trimble: That is in addition to the other conditions? Private and public air lines and also the military?

Mr. Blair: That is right. To promote air commerce. I'd like to ask the County if they have taken any records of altitudes of flights over these properties and measurements by decibels of sounds over the said properties?

Mr. Louik: If the Court please, I don't think we have to produce our evidence to the plaintiff. I don't think we have to reveal what we have done to prepare our case.

Mr. Trimble: We will get to that later on.

[fol. 49] THOMAS N. GRIGGS, sworn:

Direct examination:

By Mr. Blair:

Q. Mr. Griggs, will you describe just what took place with regard to plane operation over your property beginning in June of 1952? Was there a pattern of flight?

A. Mr. Blair, beginning in June of 1952, with the opening of the commercial airport there began a stream of planes landing and taking off over my residence and land-

ing and taking off and causing the results to which I testified this morning and in addition other results. I have to explain in connection with my prior answers that runway use is partially a matter of wind direction. The altitude of planes coming in over a runway or going out over a runway varies to some degree with the weight of the equipment, [fol. 50] the size of the plane, and also with weather conditions, but from June 2, 1952, when that runway was in use with commercial airplanes the living conditions in that house were unbearable.

Q. Did you notice the type of airplanes?

A. Yes sir—and I kept—not continuous records, but I kept some records of the use of that runway. I turn first here in 1952 and I think the first record I have in this book is Sunday, June 15—late Sunday afternoon—planes—Allegheny Air Lines, Capital and T.W.A.

Q. How did you know those airplanes?

A. I could see the designations on the ships.

Q. You mean you could read the letters on the planes?

A. Yes sir. And other times I knew the designations on the tails and on the fuselage. I could identify the planes and very often could pick them that way—also the colors.

Q. What did you notice about them on that date for instance?

A. I noticed they were coming close to my tree tops. I also noticed the noise. The next note I have is Monday, June 16, planes at dinner time and in the evening; wakened three times during the night and in the early morning, and I marked that I had seen both T.W.A. and Capital that day. Now, I note here because I said I couldn't keep these records always and I don't think it was my burden to, [fol. 51] but Monday, the 24th, 25th, 26th and 27th I was away. My next note—planes landing Sunday June 29 in the late afternoon. My next notation—planes landing late afternoon Sunday—June 29. Wednesday, July 2—planes landing. Thursday, July 3—planes landing.

Q. Why did you notice them particularly, Mr. Griggs?

A. Because they interfered with my life and my use and my happiness in my home.

Q. Because of the height, noise—or what was it?

A. Because of the noise when planes were landing, Mr. Blair, and also you will find places where they are taking off and that also interfered with my life. I also had some fears in connection with it because the planes were so close to my house, and those fears were confirmed at a later date as to which I shall testify after I get through with this part of it.

Q. Any vibration caused by these planes?

A. Yes, sir.

Q. How did you notice that and what effect did it have?

A. Window frames would rattle, and I noticed I could feel vibration on the second floor, and sometimes—I am not going to say these particular days, as I testified before the planes would go by and I could hear plaster drop behind the walls, little noises of plaster.

[fol. 52] Q. Did you have any idea how high those planes were or have any knowledge of their height?

A. Mr. Blair, what I think I would prefer to do is put in my records and come back to the place because I want to identify something here.

Q. Okay—proceed.

A. I was out of town early in June, getting home on July 10. On Saturday, July 12, planes were landing all day and night over my house, and that is a night when I had about two or three hours sleep. On Sunday, July 13, there were planes early. On Monday, July 14, I was at home in the evening and I have this notation that planes were landing—6:00 P.M.—on trees. What I meant by that was on or near the tree tops. I was on the 'phone—heard the planes. I noted here I had seven telephone calls that evening and I had to interrupt them because of these planes and put them in later. My notes at 8:00 P.M. on that day—T.W.A. plane over the house and I could read the number of it. At least the number is here. I show at 8:00 o'clock an Air Force plane was down towards the road. I show then—over the trees—a private plane. I show at 8:10 Capital Airlines; 8:12 an Air Force plane; 8:12—was an Air Force plane; 8:15 T.W.A. These times—whether it be 8:15 or 8:15½—they are as close as I could take them because I wasn't working with a stop

[fol. 53] watch. 8:45 Capital; 8:46 National; 9:00 o'clock—private red plane; 9:10 T.W.A.; 9:23—I have noted lights were on—T.W.A. The next plane after that—Allegheny Airlines—as nearly as I could tell. Next plane—9:25 Army; 9:40 T.W.A. or Capital—I couldn't be sure. I have something here I can't read with ditto marks for 9:43; 9:48 and 9:52. I have at 11:00 and 12:00 during the night—wakened; and 5:00 A.M., and 7:00 A.M. the next morning. The next night my note is—worked until 11:30; 12:00 midnight plane overhead. Wednesday, July 16, 5:00 A.M.—wakened. I was around the house in the morning and a transport went over when I was on the telephone. Several Army planes low over trees in front of house. 1:05 Allegheny Airlines—over trees. Then marked here some jets and transports, from 2:00 until 4:30. Capital—4:40; followed by Air Force; T.W.A. at 4:40; Capital—4:43; Capital—4:45; T.W.A.—4:46. Then a jet over the house—then another jet—another jet—Capital—4:55; Capital 5:04; 6:55—Capital; T.W.A.—7:40; Capital—8:00 o'clock. Then Thursday—July 17, fog in the morning. Then I go with another list of planes. On Friday, July 18—wakened by planes at 6:00 o'clock in the morning. Planes during the evening and night. Saturday, July 19—[fol. 54] five planes—6:00 to 7:30. Several during the interim between 7:30 and 9:40. Capital at 9:40; 10:00 o'clock Allegheny; 10:05—T.W.A. Then sometime after 10:00 o'clock unidentified commercial; 10:09 Allegheny Airlines; 10:15 Air Force. Sunday, July 20, at night—11:00 to 12:00 six to seven planes. There is a note I was awakened twice after that. Monday, July 21—planes again at night. That is where I stopped keeping a record there.

By Mr. Mamula:

Q. May I see that book?

A. Sure.

By Mr. Blair:

Q. Did you keep any additional records from time to time?

A. Yes sir—I have a lot of records here. In this book I

started April 4, 1953—airplanes last night. April 5—airplanes last night. April 6—ditto.

Q. What do you mean by that?

A. Airplanes were flying over my house on that runway landing that night, or taking off.

Q. How high were they flying?

A. They were low enough to waken me, Mr. Blair, that is how I knew it.

By Mr. Fawcett:

Q. How frequent?

[fol. 55] A. Mr. Fawcett, I can't answer that for every night. I have ideas about the overall frequency of it based on my observation. For the present all I can do—I can't stand up there all night and try to identify every plane that flies over, nor can I spend all my time watching the clock during the night. April 5—planes last night; April 6—planes last night; April 7—planes last night; April 8 airplanes took off last night; April 9—last night airplanes wakened me at 1:00 and 3:00. April 10—airplanes last night; April 11—planes last night; six between 11:15 and 12:15—I think it is. April 12—planes last night; April 13—planes last night until wind changed. April 23—planes last night; April 24—planes last night—bad take-off I have marked. May 2—planes last night; May 4 planes bad last night; May 8—planes last night; May 12—planes last night; May 13—planes last night; May 17—planes last night; May 22—planes last night. Monday—May—25—some planes last night; May 26—planes last night; May 29—planes last night; and I might add most of the interruptions where there is no record—these books show I was out of town. July 14, 1953—planes last night. I have a note here that they used all runways, and one took off high over the house this morning about 8:00 o'clock. Capital came in low. Wednesday, July 15—planes last night. July [fol. 56] 17, planes last night—take-offs today. July 22, planes. July 23—planes. July 25—planes last night. There are a couple of these that say "see file memos" and I will get the file memos in a minute. July 28—planes today. September 9—planes last night. September 11—planes last

night. September 12—planes last night and this morning—wakened.

By Mr. Blair:

Q. When you have in your memoranda "planes last night" do you mean one plane or more planes than one or a pattern of planes?

A. I am talking about enough planes, Mr. Blair, to interfere with my night's rest. Now, you will have to understand that wind conditions change. They changed and varied. I have watched that Airport many times under certain wind conditions and have seen planes take off in one direction and immediately after a plane take off in the opposite direction because the wind is not a controlling factor. Essentially what I am trying to say is sometimes the traffic can be substantial and I am talking about commercial traffic on one runway or the other runway or on the center runway. At other times depending on the wind it can be distributed between them. I am talking about the planes during the night that interfered with sleep and rest in our household.

[Vol. 57] Q. Mr. Griggs, I show you plaintiff's Exhibit "P", "Q" and "R". What are they?

A. Mr. Blair, this is a part of a calendar which calendar was on the wall of our kitchen. I gave instructions in the daytime because I was not there to write on this calendar when planes were over our property on take-off or landing. This first calendar covers the month of May, 1953, down through December, 1953. The second calendar runs from January, 1954, through December, 1954. The third calendar is for the year of 1955. I should say, Mr. Blair, in connection with these records as well as the ones I kept—they are not complete. There were more planes than were recorded here, but the ones that are on there do show the use of that runway when the records were kept.

Q. By whom were they taken?

A. My wife and our cook.

Q. Under your direction?

A. They were.

Q. Did you consult with them from time to time?

A. I did—and asked them and that is where I say they are not complete. Sometimes I asked if they had kept the record and they said no and then I asked them again to do it.

Q. These were made under your direction?

A. They were.

• • • • •

[fol. 85] By Mr. Blair:

Q. What did you record in the memoranda?

A. Mr. Blair, I took this memoranda by sitting in my property observing planes going over my property and landing on the northeast-southwest runway of the Airport.

Q. What, as to the number of planes could you tell or could you recall the number of planes that you saw flying over your property at that particular time?

A. Where I can count them on this memoranda—marked on the memoranda is the approximate time of each plane that went over for the most part. I will be happy to read it into the record.

Q. All right—read it.

A. 6:15—one Capital Airlines—this particular one was not over my property. 6:25 to 6:45 one Capital, one Eastern, three T.W.A., one Allegheny Airlines, two Capital. 6:55 to 7:10—two T.W.A. and then here is a word I can't read. 7:15—T.W.A. cut to southwest corner of my property. 7:16—U.S. Air Force. 7:25 Capital. 7:25—U.S. [fol. 86] Air Force. 7:26—one silver plane with a black rudder—small. 7:36 T.W.A. curved from the south. 7:38—Capital curved from the north. 7:50—U.S. Air Force over road. 7:52—Allegheny Airlines. 7:58—one white plane with blue trim—small. 8:10—a plane came over while I was at the telephone, and I recall that I couldn't hear and had to stop until the plane went past. 8:15—T.W.A. 8:30—Eastern. Then one U.S. Air Force and then from 9:30 to about 9:45—six commercial planes. Then I have the notation—"all evening." Then during the night "awakened twice". I have Thursday morning—9:30 A.M. to 9:45 about six. 9:58—Capital. 10:10—jet over the property turned north and three jets very high. 10:45—T.W.A. 11:02—

T.W.A. 11:14—commercial over Jenks across the road, cut low over the corner of my property. 11:15—Capital cut up from the southwest corner. 11:16 a plane I couldn't identify, and about the same time A.A.A.—Allegheny Airlines. About 11:18—Allegheny Airlines. 11:20—Capital up from the southeast corner. 11:25—T.W.A. 11:33—T.W.A. 11:37—Capital. 11:41—Eastern—with a question mark. 11:50—Here is one with a number—I think it is NS 8867—right over the house. I think that is it—it is not too plain. 11:51—Allegheny Airlines. 11:52—jet far down. 11:55 Lake Central. 11:56—Capital—question mark. 11:56 [fol. 87] —T.W.A. 11:58—Air Force. 12:05—T.W.A.—something about coming low. 12:07—T.W.A.—higher than usual. 12:10—Capital and then 12—I can't read it —T.W.A.—two. Then I have them marked there with jets on the field—12:14. I have the record 12:29—I was in the house and one plane came over the house. I have a note 12:31 Air Force not landing but below 500 feet. I have 12:40—a blue and white plane private. I have 12:55—looked like Air Force—red and white. Then I had at 1:05—four motor—big white Air Force plane diagonally across property. 1:30—National. 1:34—Capital. Then 1:35 to 2:45 I have no notations as far as I can recall it. 2:40—Eastern. Then I noted a couple of planes here going over other houses in the area. 4:20 Allegheny Airlines. 4:22—two jets. I have a notation—jets playing. I have 4:30 Air Force. 4:35—T.W.A.—curving in from the north. 4:37—T.W.A. 4:40—T.W.A. Then I have another note here that is not too clear to me—away from my property an Eastern. Then I have 5:00 o'clock—Northwest Airlines. I should say that in recording those times—the planes come into vision from the front of my house a considerable distance away to the east of me, and come over my property and then I watch that plane go over and my timing on picking up the next one and recording it all depends on when I [fol. 88] turn around and look at the next one—so the times are approximately accurate, but there is no accurate way to start to measure the time at a particular place or the beginning of a plane coming into sight.

Q. Mr. Griggs, I notice from your memoranda you describe the planes. Were they flying so low that you could read the lettering on them?

A. Most of them. Private planes of course would fly in high and the private planes were no real bother to us. It was primarily the commercial ships and I could read the designations on the side, see the colors, see the markings, and many times see at least part of the numbers of the planes.

Q. When the planes came in at night did they have lights—that is the planes that were landing?

A. Mr. Blair, when the planes were landing they did put their lights on before they came to the easterly boundary of my property.

Q. On the take-offs were their lights on?

A. At the beginning and for some time after the operation of the commercial Airport commenced they would have their lights on on the end of the runway and they would remain on past my house. At a subsequent stage of it they often turned their lights off. I am talking about the bright lights now—not the lights that are on when a [fol. 89] plane is in flight during the night. Sometimes before they got to my property.

Q. Mr. Griggs, were the flights of the aircraft over your property as you related them yesterday and this morning—flights landing and taking off the northeast runway of the Greater Pittsburgh Airport?

A. Mr. Blair, my testimony except for particular designations where I have said other property on those memos related only to planes that were coming over my property going into Greater Pittsburgh Airport on the northeast runway or taking off from the northeast runway.

[fol. 104] Q. Did you make any effort to learn the number or percentage of flights over the northeast runway in and out of the Airport?

A. I did.

Q. In what manner did you make that effort?

A. I inquired of Mr. Austin White who was the C.A.A. representative in the Control Tower, I think in 1953. He was present at the meeting I testified to in June of 1953.

Q. Did you ask him for the percentage of operations over the northeast runway—the record of flights?

A. Yes I did. I asked about the records of the runways. The information given to me was that there was no record.

Mr. Mamula: If the Board please—I object to a conversation with Mr. White with respect to the frequency of flight.

Mr. Trimble: Is Mr. White available for this Board? Do you know?

Mr. Blair: He is no longer there.

[fol. 105] Mr. Trimble: Is he available for this Board?

Mr. Mamula: We can find that out, Mr. Trimble. He is not the present C.A.A. representative.

Mr. Trimble: Any records available for this Board of the flights made in and out of this Airport for 1953 on this runway?

Mr. Mamula: No sir.

Mr. Trimble: The objection is overruled. Let's hear what Mr. White had to say.

(Witness continuing) Mr. White told me there was no record of which runways were used for the landing or take-offs in that period of time.

By Mr. Blair:

Q. All right now Mr. Griggs, you mentioned yesterday the sales of two parts of your property?

Mr. Mamula: Before we proceed may I amend my answer. I don't know whether the question was directed to me as to whether or not there are any records; that would have to be a qualified "no" on my part. There are records which are destroyed periodically.

Mr. Conrad: Are those the ones they destroy every thirty days?

[fol. 106] Mr. Mamula: I think Mr. Conrad knows of what I speak, and Mr. Blair and Mr. Fawcett, who were present when the C.A.A. representative told us that a recording of all flight conversations in and out of the Airport is recorded on tape for a period of thirty days, for purposes of reference in case of accident for investiga-

tion or infraction of any rule. Subsequent to the 30th day that tape is cleaned and re-used on a machine which we all looked at. There are five or six tape recorders that record for a period of four hours, then automatically shift onto another tape for an additional four, so that when I answered "Were there any records?" I think I said "no". With that explanation I still say no—other than the number of flights in and out—take-offs and landings at the Airport, there are records but not broken down as to any of the three runways.

Mr. Blair: That is what we are trying to develop. That is what we tried to find out at that time whether there was any record maintained of the operation of the various planes over the various runways in and out of the Greater Pittsburgh Airport.

Mr. Mamula: The answer to that would have to be yes, but they are not maintained beyond a period of thirty days. [fol. 107] Mr. Fawcett: Mr. Mamula, do you know when they started to keep these records.

Mr. Mamula: Nothing other than what you heard the man tell us jointly last Friday.

Mr. Blair: No record available anywhere to show the number of planes which used the northeast runway from June 1, 1952, up to within thirty days from the preceding date—isn't that about what you are saying.

Mr. Mamula: Anything that happened in the period of time in excess of thirty days preceding yesterday or today has been wiped out insofar as it being an aid in determining the number of flights.

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[fol. 193]

BEFORE THE BOARD OF VIEWERS

REPORT OF VIEWERS—Filed July 15, 1959

To the Honorable, the Judges of Said Court:

The undersigned, members of the permanent Board of Viewers of Allegheny County, who were duly appointed by your Honorable Court as Viewers in the above and foregoing matter, respectfully report:

They met upon said property at the time and place named in the Order of your Honorable Court and examined the premises affected, and then and there adjourned to meet at the Court House of said County at Pittsburgh, Pennsylvania, on the 26th day of January, 1959, when and where and at subsequent adjournments of said meeting, they heard the parties in interest desiring to be heard and witnesses, touching all matters upon which they had authority to inquire and act; and they estimated and determined the damages for property taken, injured or destroyed thereby, and to whom the same are payable.

They prepared a Preliminary Report awarding to the plaintiff \$12,690.00 inclusive of detention money and gave notice to the parties of the time and place when and where said Viewers would meet and hear exceptions thereto.

Requests for Findings and Conclusions were presented and are made part hereof and marked Exhibits Nos. 1 and 2.

[fol. 194] That at the time and place so fixed, they met and heard exceptions which are attached hereto and marked Exhibits Nos. 3 and 4, together with the notes of testimony which are filed under separate cover and hereto referred to as Exhibits Nos. 5 and 5-A.

They file herewith and make part hereof a photostatic copy of Exhibit "C" showing the improvement and the premises affected.

They also file herewith and make part hereof their Findings of Fact and Conclusions of Law.

All of which is respectfully submitted.

T. B. Trimble, Jr., T. M. Conrad, Paul G. McAtee,
Viewers.

July 15, 1959.

PRELIMINARY REPORT

The undersigned Viewers have prepared the attached Statement of Facts, Question of Law and Conclusion without Exhibits; found damages including detention money in the sum of Twelve Thousand, Six Hundred Ninety and

no/100ths (\$12,690.00) Dollars, and submit the same to Counsel in lieu of regular form and notice.

Exceptions to said award may be filed in writing at the Office of the Board of Viewers within five (5) days from [fol. 195] the date of this notice and any exceptions so filed will be heard on April 22, 1959, at 9:30 o'clock, A. M.

T. B. Trimble, Jr., Thos. M. Conrad, Paul G. McAtee,
Viewers.

Acceptance of Service: David B. Fawcett, Attorney for Plaintiff; John W. Mamula, Attorney for Defendant.

FINDINGS

Thomas N. Griggs, Plaintiff, is a resident of Allegheny County, Pennsylvania; and was the owner in fee of the following tract of land and improvements thereon in Moon Township, Allegheny County, Pennsylvania:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the macadam road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West five Hundred Twenty [fol. 196] three (523) feet to the center of a macadam road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half ($420\frac{1}{2}$) feet to a point; thence by the same North $26^{\circ} 29'$ West Six Hundred Sixty-one and $14/100$ (661.14) feet to a point; thence by the same North $38^{\circ} 31'$ West Three Hundred Fifty-seven and $84/100$ (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North $54^{\circ} 51'$ East Three Hundred Seventy and $93/100$ (370.93) feet to a point; thence by the same North $47^{\circ} 27'$ East Three Hundred Sixteen and one-half ($316\frac{1}{2}$) feet to a line of land now

or formerly of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon one large stone and stucco residence two cottages, a four-car garage with apartment above, a frame br and pump house.

The County of Allegheny, Defendant, a "public agency" sponsored, owns and maintains the Greater Pittsburgh Airport on land purchased by it in Moon and Findlay [fol. 197] Townships as a public improvement to provide airport and air transport facilities for the use of the general public in conformity with the Rules and Regulations of the Civil Aeronautics Administration within the scope of the "National Airport Plan."

Among said facilities, the Northeast-Southwest runway with "clear zone" and "approach area"; said "approach area" extending beyond and over the land of said Griggs.

Plaintiff's Exhibit "O" is composed of three executed documents, with amendments, between the County of Allegheny and The United States of America (Acting through the Administrator of Civil Aeronautics) designated "Project Application", "Sponsor's Assurance Agreement" and "Grant Agreement", the relevant parts of which are:

- a. Agreement by County to abide by and adhere to the Rules and Regulations of Civil Aeronautics Administration (Project Agreement).
- b. . . . "the sponsor (County of Allegheny) "will maintain a master plan of the airport, including" . . . "approach areas" . . . (Sec. 1 b. Sponsor's Assurance Agreement).
- c. . . . "The airport approach standards to be followed in this connection shall be those established [fol. 198] by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless

otherwise authorized by the Administrator"; and the County of Allegheny further agreed that it

"will acquire such easements or other interests in lands and air space as may be necessary to perform the covenants of this paragraph" (Sec. 1 j. Sponsor's Assurance Agreement).

- d. "The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator." (Paragraph 8 (i) of Amended "Grant Agreement."

That in compliance with said Rules and Regulations of Civil Aeronautics Administration the County of Allegheny laid out and submitted for approval said "Master Plan" including required "approach areas" which was approved by said Civil Aeronautics Administration and adopted as the plan for the Class V airport sponsored by the County of Allegheny and designated as the "Greater Pittsburgh Airport". A copy of part of said plan designating the [fol. 199] location of approach area and property of plaintiff is adopted as Viewers' Plan and attached hereto and marked Exhibit "C".

The approved and established standards for approach area for Northeast runway were center line extension 10,000 feet beyond "clear zone", a 200' strip of same width and elevation of runway as projected, with gradient of 1 on 40 having splayed slope surface with lateral width extended uniformly from 500 feet to 2500 feet with varying depths or heights from zero to 250 feet at end of center line projected 10,000 feet.

The residence of said plaintiff is bisected by a theoretical line vertical to the center line of runway as projected 3250 beyond end of "clear zone" within said approach area; and said center line being 420 feet more or less eastwardly from center of said residence.

The portion of plaintiff's property within said approach area contains the residence, garage, stucco cottage, tennis

courts and elaborate landscaping; and 6.1 acres of land, more or less.

Said Viewers' Plan shows elevation at end of northeast runway to be 1150.50 feet above sea level; the door sill of plaintiff's home to be 1183.64 feet above sea level; the top of chimney of said home to be 1219.64 feet above sea level; the slope gradient of approach area to be as 40 is to 3250' or 81 feet above 1150.50' or 1213' thus leaving a clearance [fol. 200] of 11.36 feet at plaintiff's residence, or the difference between height of aircraft on climb out or let down to runway elevation of 1150.50 flying on a 1 on 40 gradient 3250' distant (sic) from end of "clear zone".

The date of opening Greater Pittsburgh Airport was June 1, 1952, said date of opening being so designated by Resolution of the Commissioners of Allegheny County adopted May 27, 1952.

Affective (sic) as of said date of opening Defendant executed leasehold agreements in conformity with Rules and Regulations of Civil Aeronautics Administration with the several commercial airlines licensed by Civil Aeronautics Board to use Greater Pittsburgh Airport granting inter alia the right "to land, take off" * * *

Since the opening of said Greater Pittsburgh Airport the Northeast runway with its approach area has been in regular operational use for landing and taking off of commercial and other aircraft in regular flight patterns at heights near and over plaintiff's residence and over plaintiff's land on take-off varying from thirty (30) feet to three hundred (300) feet, and on let-down fifty-three (53) feet to one hundred fifty-three (153) feet.

The interference by the low flight of airplanes with plaintiff's existing use and enjoyment of his property resulted [fol. 201] from the noise, disturbances and vibration created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the plaintiff's residence; said noise of planes over plaintiff's property on let-down to the Northeast runway being comparable to that of a noisy factory, and in take-off to the noise of a riveting machine or steam hammer.

The low altitude flights over plaintiff's property caused the plaintiff and occupants of his property to become ner-

vous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use.

The opening of Greater Pittsburgh Airport and its consequences caused a diminution in value of plaintiff's property in its adapted use.

Plaintiff's Requests for Findings of Fact accepted and substantially incorporated herein are as follows: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 31, 32, 33. Those denied are: 9, 12, 13, 14, 17, 26, 27, 34, 35, and 36.

Plaintiff's Requests for Conclusions of Law are accepted as follows: 1, 2, 3, 4 and 5 to the extent that the latter conforms to the conclusions herein. Those denied are: 6.

Defendant's Requests for Findings of Fact accepted as follows: 1, 3, 6, 7, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 29, 30, 31, and 32. Those denied [fol. 202] are: 2, 4, 5, 8, 9, 10, 25 and 28.

Defendant's Requests for Conclusions of Law are denied in toto.

QUESTION

Is the County of Allegheny liable to T. N. Griggs as the result of the exercise of its power of eminent domain in the location, laying out and opening of Greater Pittsburgh Airport?

DISCUSSION

The property of Griggs lies beneath the area projected from the end of the "clear zone", being a 200-foot long strip corresponding with the width and elevation of the concrete Northeast runway. This area is designated as the "approach area" and has the same center line projected as said runway. It was located with engineering precision in compliance with Civil Aeronautics Administration "standards" as to width, length and depth to meet the Federal qualifications and requirements for the laying out and public use of a "Continental Airport" such as the County of Allegheny proposed for the Greater Pittsburgh Airport.

The "standards" adopted and used in the laying out by the County of Allegheny of this Northeast runway approach area were an extension of the center line 10,000 [fol. 203] feet beyond clear zone with a gradient of 1 to 40 and having a splayed slope surface with lateral width extending uniformly from 500 to 2500 feet. The approach area thus has varying depths or heights from zero at clear zone elevation to 250 feet at the end of the center line projected 10,000 feet. At the Griggs' property the surface of the approach area is only 11.36 feet above the residence due to the increase in elevation of the land, which is shown on Plaintiff's Exhibit "C" and adopted as the Viewers' Plan bearing the same letter identification.

In the law, as distinguished from airmen's and engineers' parlance in which "glide angle" is in common usage, the word "approach" has a definite and positive meaning. It is an integral part of a public structure, like a bridge, but for its existence, the structure would be incomplete and without public utility. In a controversy between Penn Township and Perry County, reported in 78 Pa. 457, where the County built only the bridge structure and left the approach for the Township to construct, the Supreme Court of Pennsylvania, by Mr. Justice Gordon, said (p. 459):

"The design of bridging is to provide a safe and convenient passage for the public over some stream or ravine, but no such passage is afforded when the structure cannot be approached. Can a house be said to be finished until there are steps up to its doors or [fol. 204] stairs to its chambers? And how can a bridge be said to be completed without the proper means of access? Certainly this is so necessary to its use, that without it, the structure is a vain thing; utterly useless and of no account. The bridge is incomplete until everything necessary for its proper use has been supplied, and every such necessary appliance is part of the bridge. When, therefore, the Act of Assembly directed the counties of Dauphin and Perry to build this bridge over the Juniata, it meant that these two counties without the aid of the townships

should provide a safe and convenient passage or highway over that river, and not merely that they should set up a structure which the public could not reach."

Citing the *Penn Township case, supra*, the eminent past Dean of the Dickinson Law School, Trickett, in his authoritative "Pennsylvania Road Law", has this to say (p. 330):

"The bridge is not composed merely of its piers, abutments, arches and superstructure. Whatever is necessary to make feasible ingress and egress, is a part of it, and if the County has become liable to erect the bridge it has ipso facto become liable to construct these approaches."

In addition to bridges, the same view of the law has been applied to subways. *Knoll v. Harborecreek Township*, 86 Pa. Super. Ct. 423.426.

[fol. 205] Laying out this approach imposed a burden on the land of Griggs for the flight of aircraft to and from the Greater Pittsburgh Airport. To this extent the County of Allegheny has exercised the power of eminent domain conferred upon it by implication by the Act of May 21, 1923, P. L. Sec. 1, which reads as follows:

"That any county of the second class in this Commonwealth is hereby authorized and empowered to acquire by lease, purchase or condemnation proceedings any land within the limits of the County for the purpose of establishing and maintaining thereon airdromes or aviation landing fields, whenever the county commissioners of the county, by resolution duly adopted deem it advisable so to do."

Although the County of Allegheny purchased all the "land" required for the location of the physical structures at the Airport, it had been invested with the right to appropriate such land and the grant of that right carried with it by necessary implication the power to take all interests in land necessary to operate the Airport facilities for public use. Such an implied grant of power of eminent domain is analogous to that of railroads for the construc-

tion of switches and sidings, as to which it was held in *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 286:

[fol. 206] "The right to build the switch and siding is included as a necessary incident in the right to build a railroad . . . even where there is no expressed power in the charter to construct switches, it is clearly to be inferred from the general power conferred, and the essential purposes of the grant."

The power to appropriate "land", therefore, carried with it the power to appropriate an easement over the land and the laying out of that easement by a plan constituted an act of dominion or condemnation by the County of Allegheny. The resulting burden upon the land is similar to that which follows the laying out of a street or road.

The "taking" of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 1201 A. M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a [fol. 207] country estate. We determine the "after" diminished value of the property as being directly and immediately caused by frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of \$12,690.00.

T. P. Trimble, Jr., T. M. Conrad, Paul G. McAtee,
Viewers.

July 15, 1959.

[fol. 208]

EXHIBIT No. 1 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
DefendantPLAINTIFF'S REQUEST FOR FINDINGS OF
FACT AND CONCLUSION OF LAW

*To the Honorable, Thomas P. Trimble, Jr., Thomas M.
Conrad and Paul G. McAtee, Viewers.:*

Now comes the Plaintiff, Thomas N. Griggs, by his attorneys, William A. Blair and David B. Fawcett, and respectfully requests your Honorable Board to make the following Findings of Fact and Conclusions of Law in the above captioned case:

FINDINGS OF FACT

1. Thomas N. Griggs, Plaintiff, is a resident of Allegheny County, Pennsylvania.
2. The County of Allegheny, Defendant, is a political subdivision of the Commonwealth of Pennsylvania.
3. Thomas N. Griggs, Plaintiff, on the dates material to this action was the owner in fee of the following tract [fol. 209] of land and improvements thereon in Moon Township, Allegheny County, Pennsylvania:

ALL that certain tract of land situate in the Township of Moon, County of Allegheny and Commonwealth of Pennsylvania, and bounded and described as follows:

BEGINNING at the intersection of the macadam road, known as the Coraopolis Road, with the Westerly line of property now or formerly of William McClinton Heirs, and running thence by the center of said Coraopolis Road South $65^{\circ} 26'$ West Five Hundred Twenty-three (523) feet to the center of a macadam road known as the Beaver Grade Road; thence by the same North $21^{\circ} 9'$ West Fifty-five and $53/100$ (55.53) feet to a point; thence by the same North $15^{\circ} 41'$ West Four Hundred Twenty and one-half ($420\frac{1}{2}$) feet to a point; thence by the same North $26^{\circ} 29'$ West Six Hundred Sixty-one and $14/100$ (661.14) feet to a point; thence by the same North $38^{\circ} 31'$ West Three Hundred Fifty-seven and $84/100$ (357.84) feet to the center of road known as the Thorn Run Road; thence by said Road North $54^{\circ} 51'$ East Three Hundred Seventy and $93/100$ (370.93) feet to a point; thence by the same North $47^{\circ} 27'$ East Three Hundred Sixteen and one-half ($316\frac{1}{2}$) feet to line of land now or formerly [fol. 210] of William McClinton Heirs aforesaid; and thence by said McClinton land South 21° East Sixteen Hundred Forty-eight (1648) feet to the place of beginning.

CONTAINING 19.161 acres.

HAVING erected thereon one large stone and stucco residence, two cottages, a four car garage with apartment above, a frame barn and pump house.

4. The Greater Pittsburgh Airport is owned and maintained by the County of Allegheny, on land owned by it, in Moon and Findlay Townships.

5. The Greater Pittsburgh Airport is a public improvement constructed and maintained to provide airport and air transport facilities for the use of the general public.

6. The Greater Pittsburgh Airport comprises, among other facilities, a large Administration Building and landing areas assigned to each of several commercial airlines.

7. The County owns and maintains at said Airport, and as an integral part thereof, a system of runways for the landing and taking off of airplanes at said Airport, being known and designated as the Northeast-Southwest runway, the East-West runway, and the Northwest-Southeast runway. (Exhibit B.)

[fol. 211] 8. The Plaintiff's property is located in the "Approach Zone" or the glide angle or glide path of said Northeast runway. (Exhibits C., D., E. and F.)

9. The Plaintiff's property is situate approximately Thirty-one Hundred (3100) feet from the end of the Northeast runway.

10. The Greater Pittsburgh Airport, including the facilities connected therewith, was opened for public use on June 1, 1952. (Exhibit G., p. 32.)

11. At or about the time the said Airport was opened for public use, the County of Allegheny entered into leases with certain commercial airlines whereby, for the considerations therein named, it granted to them, in connection with the Greater Pittsburgh Airport, the right, inter alia, "to operate a transportation system by airplane for the carriage of persons, property, cargo, and mail . . . to land, take-off, fly, taxi, tow, park, load and unload airlines' aircraft and other equipment used in the operation of scheduled, shuttle, courtesy, test, training, inspection, emergency, special charter, sightseeing and other flights . . .".

12. That prior to the opening of the Airport for public use, the said Airport was used solely for the landing and taking off of military planes.

13. That said military planes were mostly of the lighter type or two motor planes; that said military planes did not follow a flight pattern in and out of said Airport, and made [fol. 212] only occasional low flights over Plaintiff's property.

14. That said flights of military airplanes in and out of the Airport did not interfere with the use and enjoyment of Plaintiff's property. (Testimony, pp. 32 and 57.)

15. Since the opening of said Greater Pittsburgh Airport on June 1, 1952, for public use, the Northeast runway has been used for the landing and taking off of commercial and other aircraft.

16. Commencing on June 1, 1952, regular patterns of flight of aircraft landing at and taking off from the Northeast runway and other runways available at the Greater Pittsburgh Airport were established.

17. That the extent and periodic duration of the use of said Northeast runway varies with wind and weather conditions, as well as the availability of the other runways.

18. That beginning June 1, 1952, the property of the Plaintiff became subject to regular flights of airplanes in landing at and taking off from the Northeast runway at said Airport.

19. That such flights were, and are, at such low altitudes and at such frequent intervals as to constitute a direct and immediate interference with Plaintiff's use and enjoyment of the land.

[fol. 213] 20. The interference by the low flight of airplanes with Plaintiff's existing use and enjoyment of his property resulted from the noise, disturbances and vibration created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the Plaintiff's residence. (Testimony, pp. 26, 27, 28, 36 and 85.)

21. That the noise of planes over Plaintiff's property in landing at the Greater Pittsburgh Airport on the Northeast runway is comparable to a noisy factory. (Testimony, p. 84.)

22. That the noise of planes over Plaintiff's property in taking off the Northeast runway is comparable to the noise of a riveting machine or steam hammer. (Testimony, p. 84.)

23. As a result of the low and frequent flights over Plaintiff's property, the Plaintiff and the occupants of his property became nervous and distraught, the property became unfit as a residence, and Plaintiff and his family were compelled to remove therefrom. (Testimony, pp. 54, 55 and 57.)

24. As a further result of the low and frequent flights of aircraft over Plaintiff's property, it was rendered undesirable and unbearable for normal residential use and has suffered serious loss in value. (Testimony, pp. 34 and 35.)

25. That the said "Approach Zone" or glide angle or glide path of flight over Plaintiff's property begins about [fol. 214] two hundred (200) feet from the Northeast end of the Northeast runway, at a width of five hundred (500) feet and gradually increases to a width of twenty five hundred (2500) feet at a distance of ten thousand two hundred (10,200) feet from the end of said runway. (Exhibits C. and D.)

26. That the said "Approach Zone" or glide angle or glide path is approximately one thousand (1,000) feet in width at the distance of thirty-one hundred (3100) feet from the Northeast end of the Northeast runway. (Exhibits C. and D.)

27. The approach zone to the Northeast runway includes all the property of Plaintiff extending from the Southerly side or front thereof Northwardly a distance of six hundred (600) feet and passes over the principal buildings thereon.

28. That the said Northeast runway is a non-instrument runway, and the "slope" or angle thereof is forty to one (40:1) or forty (40) feet of horizontal distance to one (1) foot of vertical distance. (Exhibits C., D. and E.)

29. That the bottom of said glide angle or glide path is approximately forty-three (43) feet above the ground level of Plaintiff's residence and approximately thirteen (13) feet above the chimney on said residence. (Exhibits C. and D.)

30. That the heights of airplanes over Plaintiff's residence on taking off from the Greater Pittsburgh Airport [fol. 215] vary from thirty (30) feet to three hundred (300) feet, and on landings fifty-three (53) feet to one hundred fifty-three (153) feet. (Testimony, pp. 55 and 56.)

31. The flights of aircraft over Plaintiff's property are below the safe altitude of flight as prescribed by the Federal Aviation Agency (formerly Civil Aeronautics Authority) and as adopted by the Pennsylvania Aeronautics Commission.

32. Landing of aircraft at the Greater Pittsburgh Airport cannot be accomplished from the safe altitude of flight of five hundred (500) feet above Plaintiff's property. (Exhibit D.)

33. The "approach zone" over Plaintiff's property to the Northeast runway is necessary to provide airport and air transport facilities for the use of the general public and is a part of said Airport.

34. That the fair market value of Plaintiff's property before the Greater Pittsburgh Airport was opened for public use on June 1, 1952, was Seventy-five Thousand (\$75,000.00) Dollars.

35. That the fair market value of Plaintiff's property on and after June 1, 1952, when the Greater Pittsburgh Airport was opened for public use and as affected by such public use is Forty Thousand (\$40,000.00) Dollars.

[fol. 216] 36. That Plaintiff has been damaged by reason of such public use in the amount of Thirty-five Thousand (\$35,000.00) Dollars.

CONCLUSIONS OF LAW

1. The County of Allegheny, owner of the Greater Pittsburgh Airport, is empowered to acquire by grant, purchase or condemnation land and property rights necessary to accomplish the public purpose of the Greater Pittsburgh Airport.

2. The approach zones at the Greater Pittsburgh Airport, including the Northeast approach zone, are necessary

to provide airport and air transport facilities for the use of the general public and are a part of the Greater Pittsburgh Airport.

3. The flights of airplanes over the Northeast approach zone of the Greater Pittsburgh Airport are at such low altitudes over Plaintiff's property as to interfere with and prevent his existing use and enjoyment thereof.

4. The ownership of such airspace over Plaintiff's property as is necessary to the enjoyment of the use of the surface is vested in the Plaintiff.

5. The County of Allegheny has taken and appropriated for public use a permanent avigation easement or a fee simple interest in the airspace over Plaintiff's property [fol. 217] extending from the Southerly side or front thereof Northwardly a distance of six hundred (600) feet beginning at thirteen (13) feet above the principal residence thereon and extending vertically to the safe altitude of flight a distance of five hundred (500) feet above said property.

6. As a result of such taking or appropriation the property of the Plaintiff has been damaged in the amount of Thirty-five Thousand (\$35,000.00) Dollars.

Respectfully submitted,

WILLIAM A. BEAN
DAVID B. FAWCETT
Attorneys for Plaintiff

[fol. 218]

EXHIBIT No. 2 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
Defendant

PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR CONSIDERATION OF THE
BOARD OF VIEWERS

The County of Allegheny by Maurice Louik, its Solicitor, John W. Mamula, its Second Assistant Solicitor, and Thomas J. Dempsey, its Assistant Solicitor, respectfully submits the following proposed findings of fact and conclusions of law for consideration of the Board of Viewers appointed in this action.

FINDINGS OF FACT

1. Thomas N. Griggs, hereafter called plaintiff, purchased a tract of land in Moon Township, Allegheny County, on January 22, 1945 from Mabelle R. McMahon, for the sum of \$20,000 the said property consisting of somewhat over 19 acres, and having erected upon it a main resi-
[fol. 219] dence, a 4 car garage with apartment above, a frame cottage, a pump house and a frame stable or barn.
2. At the time the plaintiff purchased the said property he was familiar with the existence and location of the Greater Pittsburgh Airport owned by the County of Allegheny in Moon Township.

3. The plaintiff occupied the said property with his family as a residence until shortly after December 1, 1955 at which time he and his family moved to another home.

4. The plaintiff sold the main house and somewhat over 4 acres by deed of general warranty dated March 26, 1956 for \$25,000 to the Board of Trustees for the Episcopal Diocese of Pittsburgh.

5. By deed of general warranty dated July 27, 1956 plaintiff sold the 4 car garage with the apartment above and 1.2 acres of ground to Franklin E. Bashline and Alice I. Bashline, his wife, for \$9000.00.

6. Plaintiff is still the owner of approximately 15 acres of the original tract purchased by him having a frame barn or stable, a frame cottage and a pump house erected thereon.

7. The frame cottage located on the property of the plaintiff has been occupied by tenants paying a rental of [fol. 220] \$25.00 per month from sometime prior to June 1, 1952 until the present with a vacancy at only one time of a couple of weeks.

8. In 1940 the County of Allegheny acquired the Bell farm in Moon Township for airport purposes, and thereafter continued to acquire other property and to construct the Greater Pittsburgh Airport.

9. In 1941 the Greater Pittsburgh Airport began operating as a base for military planes.

10. The zoning ordinance of Moon Township dated May 10, 1943 which was effective when the plaintiff bought his property shows the location of the County airport on the zoning map made a part of the ordinance, and also shows the property of Mabelle R. McMahon, the predecessor in title of the plaintiff, in an area zoned residential A, which classification allows single family residences and certain non-residential uses.

11. By Resolution dated May 27, 1952, the Board of County Commissioners of Allegheny County fixed the opening date of the Greater Pittsburgh Airport for commercial airlines services as June 1, 1952 at 12:01 A.M.

12. By leases dated June 3, 1952 and by subsequent leases, the County of Allegheny granted to TWA, Capital Airlines and other airlines the use of the airport premises [fol. 221] in common with others including the right to operate a transportation system by airplanes, the right to land, take-off and fly aircraft, and the rights of ingress to and egress from the premises and facilities of the Greater Pittsburgh Airport. The payments due from the airlines for these rights were to become effective as of the day which the Board of Commissioners of Allegheny County by Resolution designated as the opening date of the airport for commercial airline services.

13. On June 1, 1952, the Greater Pittsburgh Airport opened for commercial airline services in accordance with the Resolution of the Board of Commissioners, and commercial flights into and from the airport commenced on that day and have continued since that time. At the time that the airport was opened for commercial purposes, the County owned approximately 1500 acres in fee simple.

14. In landing and taking-off at the Greater Pittsburgh Airport, the aircraft of the commercial airlines utilize one of the several runways constructed and existing at the airport depending upon wind and other conditions and circumstances existing at the time of the landing or take-off.

15. The property of the plaintiff lies to the North and East of an extension of the center line of the Northeast-Southwest runway of the Greater Pittsburgh Airport and [fol. 222] distant 3450 feet from the northeasterly end of the Northeast-Southwest runway though separated from the airport boundary and the runway terminus by intervening properties, by the Allegheny County Airport Parkway, a divided 4 lane express highway, and by the Coraopolis Carnot Road. The property of the plaintiff lies within the designated approach zone for aircraft utilizing the Northeasterly end of the Northeast-Southwest runway as it existed in June of 1952 and as it exists to date.

16. On June 15, 16 and 29 of 1952 aircraft flew over plaintiff's property at indeterminate altitudes.

17. On July 2, 3, 12, 13, 14, 15, 16, 18, 19, 20 and 21 of 1952 aircraft flew over plaintiff's property at indeterminate altitudes.

18. On April 4, 5, 6, 8, 9, 10, 11, 12, 13, 23 and 24 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

19. On May 2, 4, 8, 12, 13, 17, 22, 25, 26 and 29 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

20. On July 14, 15, 17, 21, 23, 25 and 28 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

21. On August 12 and 13 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

[fol. 223] 22. On September 9, 11 and 12 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

23. On October 13 and 20, 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

24. On November 16 and 17 of 1953 aircraft flew over plaintiff's property at indeterminate altitudes.

25. The plaintiff made no proper measurement of the altitude of the above mentioned flights above or in the vicinity of his property and his recollections of many of them are limited to the existence of "planes overhead" though a number of flights disturbed his sleep and made conversation difficult.

26. The plaintiff's own valuation testimony was based upon the value to him of his property as a country estate type home.

27. The plaintiff's expert real estate witness fixed the after-value of the plaintiff's property as affected by the alleged taking on May 15, 1952, which was prior to the time the airport was opened for commercial airline use and prior to the time the plaintiff complained of aircraft flights over or in the vicinity of his property.

28. The Board of Commissioners of Allegheny County has never adopted a Resolution or other official enactment [fol. 224] appropriating plaintiff's property or any part of

his property or any interest in his property by virtue of the eminent domain powers vested in the County of Allegheny.

29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.

30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.

31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.

32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off.

CONCLUSIONS OF LAW

1. The plaintiff has not proved that the nature, character and frequency of the flights of aircraft over or in the vicinity of his property were such as to constitute a taking of his property or any part of it or any interest in it by any person, organization or body, public or otherwise.

2. There were no flights of aircraft over plaintiff's property below the navigable air space of the United States of America.

[fol. 225] 3. The County of Allegheny has not by Resolution, official enactment, or otherwise taken plaintiff's property or any part of it or any interest in it for any purpose or use.

4. The plaintiff has not proved by any competent evidence that the fair market value of his property was depreciated by reason of any flights of aircraft over or in the vicinity of his property.

Respectfully submitted

MAURICE LOUIK
County Solicitor

JOHN W. MAMULA
Second Assistant County
Solicitor

THOS. J. DEMPSEY
Assistant County Solicitor

[fol. 226]

EXHIBIT No. 3 TO REPORT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
Defendant

EXCEPTIONS TO PRELIMINARY REPORT
OF BOARD OF VIEWERS

AND NOW, comes Thomas N. Griggs, Plaintiff, by his attorneys, William A. Blair and David B. Fawcett, and respectfully files Exceptions to the Preliminary Report of the Board of Viewers in the above captioned case, as follows:

1. Plaintiff excepts to the action of the Board in denying Plaintiff's Request for Findings of Fact Nos. 9, 12, 13, 14, 17, 26, 27, 34, 35 and 36.

2. Plaintiff excepts to the action of the Board in denying Plaintiff's Request for Conclusion of Law No. 6.

3. Plaintiff excepts to the award of the Board in that the Board erred in substituting for the uncontroverted expert testimony of Plaintiff's case as to damages, said testimony being predicated upon views made before and immediately after the taking, to wit, June 1, 1952, the Board's own ideas of value predicated upon its view made more than six years after the taking and after the residence [fol. 227] property portion had changed hands; such action

is contrary to the intent of the statutes establishing the Board and its powers.

4. Plaintiff excepts to the award as being arbitrary, capricious and against the weight of and contrary to the uncontradicted evidence.

5. Plaintiff excepts to the award on the grounds that the Board disregarded the only sound evidence of damage under the circumstances of this case.

6. The Plaintiff excepts to the award as being contrary to law, for the award is contrary to the evidence binding upon the Board under the circumstances of this case.

7. Plaintiff excepts to the award for damages including detention money in the sum of Twelve Thousand Six Hundred Ninety and 00/100 (\$12,690.00) Dollars as inadequate.

8. WHEREFORE, the exceptant, reserving the right to file additional exceptions, respectfully requests the Board to correct and make the said award conform to law and to the evidence.

WILLIAM A. BLAIR

DAVID B. FAWCETT

Attorneys for

Thomas N. Griggs

And now 13 July, 1959 exceptions overruled.

T. P. TRIMBLE, JR.

T. M. CONRAD

PAUL G. McATEE

Viewers

[fol. 228]

EXHIBIT No. 4 TO REPORT
IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
No. 2384

July Term, 1958

THOMAS N. GRIGGS,
Plaintiff

v.

COUNTY OF ALLEGHENY,
Defendant

EXCEPTIONS

The County of Allegheny excepts to the award made by the Board of Viewers to THOMAS N. GRIGGS in the above entitled proceeding for the following reasons:

1. The award of the Board of Viewers in the sum of \$12,690.00 is contrary to law and the weight of the evidence.
2. The award is excessive.

MAURICE LOUIK
County Solicitor
THOS. J. DEMPSEY
Assistant County Solicitor

And now 13 July, 1959 exceptions overruled.

T. P. TRIMBLE, JR.
T. M. CONRAD
PAUL G. McATEE
Viewers

[fol. 229]

IN THE COURT OF COMMON PLEAS

ORDER OF MAY 29, 1958

Allegheny County, ss:

At a Court of Common Pleas, held and kept at Pittsburgh, on the 29th day of May in the year of our Lord one thousand nine hundred and Fifty-eight, before the honorable W. H. McNaugher, President Judge of said Court:

The Petition of Thomas N. Griggs, was presented, setting forth that

Order of Court

And now, to-wit, this 29th day of May, 1958, on motion of William A. Blair and David B. Fawcett, Attorneys for petitioner, the Court appoints Thomas P. Trimble, Jr., Thomas M. Conrad and Paul G. McAtee, as a Board of Viewers upon the foregoing Petition and further orders that the Board of Viewers perform its duties in accordance with the law and acts of Assembly in such case made and provided. View, Tuesday, June 24, 1958, 10 A. M. o'clock D.S.T., Returnable First Monday, March, 1959.

And Further:

It appearing to the Court that there are differences of opinion as to whether Thomas N. Griggs is entitled to collect damages described in the Petition for Appointment of Viewers; and

It further appearing that if all the questions involved in this case are to be decided at the same time, the Board of [fol. 230] Viewers would be unduly burdened by the evidence so that it would be required to hear testimony that would ultimately be ruled irrelevant.

It Is Therefore Ordered and Decreed.

1. The Board of Viewers shall, in time, determine whether the erection and operation of the Greater Pittsburgh Airport by the defendant beginning on June 1, 1952

with consequent necessary and unavoidable use of the airspace over and across the aforesaid described property below the safe navigable airspace for the purpose of ingress and egress to and from said Greater Pittsburgh Airport constituted in fact an appropriation or "taking" by the defendant of a navigation easement over said property;

2. After the litigation as to the determination of the question set forth in preceding Paragraph 1. is finally decided by the Board of Viewers, or by a Court of final jurisdiction in the case, such determination shall be conclusive upon the parties as to whether there was such appropriation or "taking" by the defendant;

3. Should the Board of Viewers determine that there was an appropriation or "taking" by the defendant, then it shall ascertain and award just compensation to the Plaintiff [fol. 231] for the damage to his property arising out of such condemnation by the defendant.

By the Court, Weiss.

From the Record, David B. Roberts, Prothonotary,
by Louis W. Sauers, Deputy.

[SEAL]

Filed May 29, 11:42 AM, 1958.

IN THE COURT OF COMMON PLEAS

EXCEPTIONS OF PLAINTIFF TO REPORT OF BOARD OF VIEWERS—Filed August 13, 1959

And Now, comes Thomas N. Griggs, Plaintiff, by his attorneys, William A. Blair and David B. Fawcett, and respectfully files Exceptions To Report of Board of Viewers in the above captioned case, as follows:

1. The Board of Viewers erred as a matter of law in substituting for the uncontroverted expert testimony of the Plaintiff as to damages, its own idea of value predicated upon its view made more than six (6) years after the taking.

2. Action of the Board of Viewers in disregarding the uncontradicted evidence as to Plaintiff's damage and sub-

stituting its own judgment with respect to damage is contrary to law.

[fol. 232] 3. The Board of Viewers erred as a matter of law in disregarding the evidence as to property values and substituting its own ideas.

4. Plaintiff excepts to the award as being arbitrary and against the weight of and contrary to the uncontradicted evidence.

5. Plaintiff excepts to the award on the ground the Board disregarded the only sound evidence of damage under the circumstances in this case.

6. Plaintiff excepts to the award as being contrary to law, for the award is contrary to the evidence binding upon the Board under the circumstances of this case.

7. Plaintiff excepts to the award for damages, including detention money from the date of the opening of the airport namely, June 1, 1952, in the sum of \$12,690.00 as inadequate.

Wherefore, the Plaintiff, reserving the right to file additional Exceptions, respectfully requests your Honorable Court to correct and make the said award conform to the law and to the evidence in this case.

William A. Blair, David B. Fawcett, Attorneys for
Thomas N. Griggs, Plaintiff.

[fol. 233]

IN THE COURT OF COMMON PLEAS

EXCEPTIONS OF DEFENDANT TO REPORT OF VIEWERS—Filed August 14, 1959

The County of Allegheny excepts to the Report of Viewers filed and confirmed nisi on July 15, 1959 and to the award to Thomas N. Griggs in the amount of \$12,690.00 for the following reasons:

1. As a matter of law the plaintiff failed to sustain the burden of proof on him to show that the nature, character and frequency of flights of aircraft over or in the vicinity of his property were such as to constitute a taking of his prop-

erty, or any part of it, or any interest in it, by any person, organization or body, public or otherwise.

2. The plaintiff did not show that there were any flights of aircraft over his property below the navigable air space of the United States of America.

3. The plaintiff did not show that any flights of aircraft were in violation of any regulations of the Civil Aeronautics Administration, which organization controls and regulates the flight of aircraft.

4. The plaintiff did not show that any flights of aircraft were lower than necessary for safe landings or safe take-offs.

5. The plaintiff failed to show that the County of Allegheny exercised any control over the flights of any aircraft.

[fol. 234] 6. There was no basis for a finding by the Viewers that the defendant had appropriated any portion or interest in the plaintiff's property since the Board of Commissioners of Allegheny County never adopted a Resolution or other official enactment appropriating plaintiff's property, or any part of it, or any interest in it, by virtue of the eminent domain powers vested in the defendant and since the evidence failed to establish such interference with the property of the plaintiff as lawfully would constitute an appropriation.

7. As a matter of law the plaintiff failed to sustain the burden of proof on him to prove by competent evidence that the fair market value of his property was depreciated by reason of any flights of aircraft over or in the vicinity of his property.

8. The testimony of the plaintiff and his witnesses was too vague, uncertain and inaccurate to sustain a finding by the Viewers that the number of aircraft flying over or in the vicinity of the plaintiff's property interfered sufficiently with the property to constitute an appropriation.

9. The testimony of the plaintiff and his witnesses was too vague, uncertain and inaccurate to sustain a finding by the Viewers that the noise of aircraft flying over in the

vicinity of plaintiff's property or the vibrations caused by such aircraft interfered sufficiently with the property to constitute an appropriation.

[fol. 235] 10. If, as the plaintiff contends and the Viewers have ruled, there was an appropriation by the County on June 1, 1952, then all evidence of subsequent flights of aircraft would be inadmissible and should have been rejected by the Viewers.

11. The report and award of the Viewers were contrary to law inasmuch as under the facts alleged in plaintiff's Petition for Appointment of Viewers, the County of Allegheny cannot legally be held liable for the appropriation for public use of aviation rights, or easements over and across plaintiff's property.

12. The report and award of the Viewers were contrary to law inasmuch as, as a matter of law, the flights of aircraft over plaintiff's property were within the free navigable air space as declared by the United States of America.

13. The report and award of the Viewers were contrary to law inasmuch as, as a matter of law, if plaintiff has any claim for the appropriation of property, it is not against the County of Allegheny.

Wherefore, the County of Allegheny requests your Honorable Court to sustain its exceptions and to send the Reports of Viewers back with instructions to find according [fol. 236] to defendant's proposed Findings of Facts and Conclusions of Law.

* Maurice Louik, County Solicitor, Thomas J. Dempsey, Assistant County Solicitor, Attorneys for County of Allegheny.

IN THE COURT OF COMMON PLEAS

OPINION

Soffel, J.

This case comes before this Court on Exceptions filed both by plaintiff and defendant to certain Findings made by the Board of Viewers.

Briefly summarized, these are the facts:

The plaintiff filed a petition for the appointment of viewers alleging that aircraft of several airlines landing upon or taking off from the northeast runway of the Greater Pittsburgh Airport descended and ascended over plaintiff's property below the safe navigable air space as fixed pursuant to acts of Congress and that by reason of said low flights, the property of the plaintiff was greatly damaged and depreciated in value. The plaintiff further averred that the defendant by reason of its right of eminent domain has, in fact, appropriated for public use an easement or fee simple interest of the air space over the plaintiff's property. Following proceedings before the Board of Viewers, [fol. 237] a report was filed by the Board of Viewers in which it made certain Findings of Fact and Conclusions of Law.

The Board of Viewers found *inter alia* that on June 1, 1952, the County of Allegheny, defendant, condemned or appropriated a superterranean easement over plaintiff's property in Moon township with consequent damage to said property. Damages in the amount of \$12,690 were awarded the plaintiff.

This case is now before this Court on Exceptions to Findings of Fact and Conclusions made by the Board of Viewers.

Plaintiff's Exceptions are directed solely to the amount of damages awarded.

Defendant's Exceptions are directed to certain conclusions made by the Board of Viewers as not being legally warranted, and contrary to decisions of the Supreme Court, to-wit:

1. There was a taking of a superterranean easement over plaintiff's property by the County of Allegheny.

2. This taking occurred as of June 1, 1952.

The background of this case is fully set forth in the case of *Gardner v. Allegheny County*, reported at 382 Pa. 88 and 393 Pa. 120. The plaintiff in the instant case was one of the plaintiffs in the group of cases which went on appeal to the Supreme Court and were decided in the *Gardner* cases. In [fol. 238] these cases, the plaintiff, together with other property owners, brought action in equity against Allegheny County and certain airlines, alleging: 1) continuing trespasses over their properties, and 2) a taking of their respective properties. In the *Gardner* case at 382 Pa. 88, the Supreme Court sustained the County's preliminary objections as to the "taking of property" and continued the case with respect to an injunction for trespass. Subsequently, in the same cases reported in *Gardner v. Allegheny County*, 393 Pa. 120, the Supreme Court stayed the pending equity proceedings until the plaintiffs either proceeded under eminent domain or in actions of trespass. The decision in the *Gardner* case at 393 Pa. 120, was entered on June 3, 1958.

A few days prior to June 3, 1958, the plaintiff filed a petition for the appointment of viewers, out of which this action arises. The Board of Viewers filed a report in which it made certain Findings of Fact and Conclusions of Law.

The Findings of Fact made by the Board of Viewers included the following, submitted by defendant:

- "29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.
30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration [fol. 239] of the United States of America.
31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.
32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off."

The Board of Viewers also accepted the Finding of Fact submitted by defendant that "aircraft flew over plaintiff's property at indeterminate altitudes".

With respect to the question of damages, the Board of Viewers also made this Finding of Fact:

- "27. The plaintiff's expert real estate witness fixed the after-value of the plaintiff's property as affected by the alleged taking on May 15, 1952, which was prior to the time the airport was opened for commercial airline use and prior to the time the plaintiff complained of aircraft flights over or in the vicinity of his property."

The Board of Viewers in its discussion concluded that there was an act of dominion or condemnation by the County of Allegheny and found that:

"The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, [fol. 240] 1952, at 12:01 A. M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time."

We shall consider the legal questions raised before this Court.

First: Did the Board of Viewers err in the amount awarded the plaintiff?

The Board of Viewers awarded the plaintiff damages in the sum of \$12690 for the taking of a superterranean easement. The plaintiff contends that the Board of Viewers was required to award damages upon the uncontradicted testimony of its real estate expert in the amount of \$35000. Plaintiff contends further that the Board failed to explain "usual procedure" or what method it used in arriving at damages in the aforesaid arbitrary amount.

The only testimony as to value was that produced by the plaintiff and his real estate expert. Plaintiff testified that the value of his property before taking was \$80000. The real estate expert, Mr. McDowell, a highly respected and exceptionally well qualified man in his field, testified that

the value immediately before the taking and as unaffected by the taking was \$75000 and that the value of the property [fol. 241] immediately after the taking as affected thereby was \$40000, or a diminution in value of \$35000.

Mr. McDowell was familiar with plaintiff's and other properties in the neighborhood for a long period of time prior to June 1, 1952, and possessed a detailed knowledge of sales and values in the vicinity. He had examined plaintiff's property immediately prior to that time and reasonably soon thereafter.

The defendant, County of Allegheny, offered no testimony on this or any other aspect of the proceedings.

Plaintiff contends that the Board of Viewers disregarded the testimony of its expert in making an award of \$12690, which includes detention money at six per cent.

Where, as in the case at bar, only one uncontradicted set of values was before the viewers and the damages awarded in no way appear related to that set of values, and where the only explanation for the variance between the two is vague and uninformative, it must be concluded that the viewers rejected in whole or in part the expert's testimony and considered other information in arriving at their conclusion. Since no other information is of record, it must be assumed that the viewers substituted their own judgment. [fol. 242] While the viewers were entitled, as are any triers of fact, to use the background of their knowledge and experience in evaluating the testimony of expert witnesses, *Leaf v. Pennsylvania Co.*, 268 Pa. 579, 112 A. 243 (1920), they were not entitled to throw away the only criteria given them in this case and substitute their own judgment based on matters not of record.

The question has been raised whether the plaintiff's action in filing an Exception to the Report of the Board of Viewers rather than taking an appeal from its decision is the correct course to be followed. We are of the opinion that it is. Questions of law are properly raised by exceptions to a viewer's report and questions of fact can only be raised by an appeal from such a report. *Lower Chichester Twp. v. Roberts*, 308 Pa. 195, 162 A. 460 (1932). *Appeal of Lakewood Memorial Gardens*, 381 Pa. 46, 112 A2d 135 (1955). The plaintiff has raised the issue of

whether the viewers could disregard the uncontradicted testimony of an expert witness in arriving at the amount of damages to be awarded, and this is clearly a question of law.

None of the cases cited by the plaintiff is in point factually, for they all involve situations in which the viewers or other fact-finding bodies when confronted with conflicting testimony, ignored that testimony and substituted their own judgment. In the case at bar, there is no conflicting testimony [fol. 243] relative to damages. The only testimony is that of the plaintiff and his expert witness. In the case at bar, the viewers did not admittedly ignore the testimony of the expert and substitute their own judgment but rather gave no explanation for the award they made other than the cursory explanation that the damages had been measured by the "usual procedure".

Despite these factual differences, the principles governing the cited cases and the instant case are the same. Triers of fact, whether judges, jurors, viewers, boards or commissions, must render their verdict, finding or award based on the testimony or other evidence presented. The fact-finding body cannot substitute for that testimony or evidence its own knowledge or belief, no matter what extraneous matter that knowledge or belief is based upon. *Cowan v. Bunting Glider Co.*, 159 Pa. Super. 573, 49 A2d 270 (1946); *Flower v. Baltimore and Phila. Railroad Co.*, 132 Pa. 524, 19 A. 274 (1890); *Avins v. Commonwealth*, 379 Pa. 202, 108 A2d 788 (1954).

We are of the opinion that plaintiff's Exceptions to the award of damages should be sustained. We believe the question of the amount awarded should be referred back to the Board of Viewers for reconsideration and discussion of the factors upon which the award was predicated.

We come now to a consideration of the issues raised by the defendant.

[fol. 244] The defendant contends, first, that the legal conclusion of the Board of Viewers that there was a "taking" of plaintiff's property by the defendant is not legally warranted under the Findings of Fact which it made. The defendant cites specifically these Findings of Fact:

29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.
30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.
31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.
32. No flights were shown to be lower than necessary for a safe landing or a safe take-off.

In addition, the defendant cites the Finding as submitted by the plaintiff and accepted by the Viewers that, "aircraft flew over plaintiff's property at indeterminate altitudes."

These Findings, says the defendant, support the conclusions that all flights of aircraft over plaintiff's property were lawful and within the navigable air/space appropriated by the Federal government. As a result, if there was a [fol. 245] "taking" of the plaintiff's property it was by the United States and not by the defendant in this action. The defendant refers us to the Air Commerce Act of May 20, 1926, c. 344 §6, 44 Stat. 572, 49 U.S.C.A. §176(a), which states:

"The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

This declaration was implemented by the passage of the Civil Aeronautics Act of June 23, 1938, c. 601 Title I §3, 52 Stat. 980, 49 U.S.C.A. §401 et seq., which states in §403:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States."

This same Act, which empowered the Civil Aeronautics Authority to carry out its provisions defined "navigable air space" as "air space above the minimum altitudes of flight prescribed by regulations issued under this chapter." (§401-24)

[fol. 246] The Civil Aeronautics Board has specifically defined the minimum altitudes of flight over both rural and urban areas. It has not defined the minimum safe altitudes for use in landing and taking-off. The defendant seeks to bridge this gap in the Civil Aeronautics Regulations by quoting the following excerpts from the first *Gardner* case, 382 Pa. 88, at page 108:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication.

... However, since take-offs and landings are obviously absolutely necessary if there are to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is reasonably necessary for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

As a buttress for the logic expressed in the above quotation the defendant also refers this Court to Civil Air Regulation No. 60, interpretation No. 1, adopted by the Civil Aeronautics Board on July 22, 1954, which read, in part, as follows:

"... Directly involved is the question whether the air-space which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term "navigable airspace" as defined in the Civil Aeronautics Act. If it does, a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by Section 3 of that Act.

... In consideration of the foregoing, the Board construes the words, 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in §60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of §3, that an aircraft pursuing a normal and necessary flight path in climb and after take-off or in approaching to land is operating in the navigable airspace."

[fol. 248] The plaintiff contends that the paths of flight over his property taken by the planes in landing and taking-off were not within the minimum safe altitudes of flight and thus not within the navigable air space pre-empted by the Federal government. The plaintiff relies principally on *United States v. Causby*, 328 U.S. 256, 90 L. Ed. 1206 (1945), which involved the same legal issue which is now before this Court. The plaintiff emphasizes the basic question to be that stated by the Viewers in its Report, page 6, to-wit:

"Is the County of Allegheny liable to T. N. Griggs as the result of the exercise of its power of eminent domain in the location, laying out and opening of Greater Pittsburgh Airport?"

An analysis of the cases cited by both parties leads us to believe that the arguments of the plaintiff must prevail. Reference to the pre-emption of air space within the glide path of planes landing and taking-off is contained only in the dicta of the Pennsylvania Supreme Court in the first *Gardner* case and is not determinative of the law. Similarly, the Civil Aeronautics Regulation, Interpretation No. 1, was issued after the alleged "taking" in this case. The law as stated in the *Causby* case, *supra*, is clear—328 U.S. at page 263:

"The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority [fol. 249] does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 USCA §180, 10A FCA Title 49, §180. If that agency prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the authority is 500 feet during the day and 1000 feet at night for air carriers (Civil Air Regulations, Pt. 61 §61.7400, 61.7401, Code Fed. Reg. Cum. Supp. title 14, c 1) and from 800 feet to 1000 feet for other aircraft depending on the type of plane and the character of the terrain. Ibid, Pt. 60 §60.350-60.3505. Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the [fol. 250] United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

... As we have said, the flight of airplanes, which skim the surface but do not touch it is as much an appropriation of the use of the land as a more conventional entry upon it.

... The superadjacent airspace as this low altitude is so close to the land that continuous invasions of it

affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

In the *Causby* case the government raised the very same questions that the defendant is now seeking to raise here; namely, (1) the government did not take property in using the air space over the land; (2) since the Federal government has asserted control over the use of air space by aircraft, there was no "taking;" (3) that the flight of the aircraft was within the navigable air space as defined by [fol. 251] the statutes and regulations and such flights were an exercise of the declared right of travel through that air space. The law as thus stated in the *Causby* case, *supra*, effectively disposed of those questions and likewise the questions which the defendant raises here.

See also *Highland Park, Inc. v. United States*, 161 F. Supp. 597; *Freeman v. United States*, 167 F. Supp. 541; *Cravens v. United States*, 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims*, decided October 8, 1958; *Ralph Dick et al. v. United States*, 169 F. Supp. 491; *Hopkins v. United States*, 173 F. Supp. 245 (Advanced report-July 13, 1959); and *United States v. Ashcraft, et al.*, 176 F. Supp. 447 (Advanced report—October 26, 1959). These cases uniformly recognize that the government has not appropriated the space necessary to land and take off.

In the *Ashcraft* case cited *supra*, Judge Yankwich makes this pertinent observation—p. 448:

"... Regardless of any congressional limitations, the land owner as an incident to his ownership, has a claim to the superadjacent airspace at such altitude as interferes with his enjoyment of the property and 'that invasions of it are in the same category as invasions of the surface.' *United States v. Causby*, 1946, 328 U.S. 256, 265, 66 S. Ct. 1062, 90 L. Ed. 1206."

[fol. 252] The defendant concludes that, by reason of the fact that low flights are not in violation of the Civil Aeronautics Authority regulation and that they are not lower

than necessary for safe landing or taking off, they are lawful and within the navigable air space appropriated by the United States of America. The answer to this assumption is:

1. The flights are lawful only if there has been a "taking" of the plaintiff's property and just compensation paid for it; and
2. The *Causby* case decides such flights are not within the minimum safe altitude of flights within the meaning of the statute.

Reduced to its simplest terms the contention of the defendant is that the regulations of a Federal agency can extinguish private property rights and that such is also the view of the Civil Aeronautics Authority which promulgates the regulation. It is submitted that the regulation of a Federal agency and that agency's interpretation of its regulation cannot be the law of the land. Private property rights are determined by the law of the state in which it is located and cannot be acquired for public use except in the manner provided by law.

[fol. 253] We therefore conclude, as did the viewers by implication, that the flights of aircraft over the land of the plaintiff were not within the navigable air space as defined by Federal regulations and were not operated over or in an easement which the Federal government had previously "taken."

This conclusion is not in conflict with Findings of Fact Nos. 29, 30, 31 and 32 as made by the Viewers. Lack of control over the aircraft by the defendant (Finding of Fact No. 29) in no way affects or is related to our conclusion. The same must be said of Finding of Fact No. 30. Finding of Fact No. 31, that no flights were shown to be in violation of the regulations of the Civil Aeronautics Administration, is not inconsistent with the conclusion that the flights were not within the navigable air space; the regulations in effect at the time the flights were made did not define a minimum safe altitude or navigable air space, so that it was entirely possible for those flights to be in accordance with the existing regulations and still not within the

navigable air space as discussed in the *Causby* case. Finding of Fact No. 32, that no flights were shown to be lower than necessary for safe landing or a safe take-off, can be reconciled with the conclusion in the same manner.

There remains but one question to be resolved: Do the Findings of Fact support the conclusion that there was a [fol. 254] "taking" by the defendant? The general principle of law that there is liability for interference by aircraft with the air space above property is found in this excerpt from *Crew v. Gallagher*, 358 Pa. 541, 58 A. 2d 179 (1948), at page 547:

"Although the Aeronautical Code of May-25, 1933, P. L. 1001, and the Air Commerce Act of 1926 . . . diminish the absolute rights that landowners had to the space above the surface of their land under the common law, they do not authorize the flight of aircraft at such low altitudes as to interfere with the reasonable use and enjoyment of the land. See *United States v. Causby*, 328 U. S. 256 . . . After the establishment of a regular flight traffic pattern, if airplanes fly very close to plaintiffs' building, or in any other way cause real damage to plaintiffs' property adequate relief in equity will be available . . ."

In *Dlugas et ux. v. United Air Lines*, 43 D & C 402, the law is thus stated:

"It may be observed in concluding . . . that the A.L.I. Restatement of the Law of Torts, §194, considers flights of aircraft over the lands of another to be privileged only if at a height so as not to interfere unreasonably [fol. 255] with the possessor's enjoyment of the surface and the air space above it."

Under these statements of the law, and under the facts found by the Viewers, there was an unreasonable interference with the plaintiff's enjoyment of the surface of his land and the airspace above it, and that interference constituted a "taking" by the defendant.

The defendant asserts, however, that the liability of the defendant can be established only if it is shown that the

flights were unlawful, relying on the language in the *Gardner* cases. It further asserts the Findings of Fact cited above lead inevitably to the conclusion that all flights were lawful and were in conformity with the regulations of the Federal agency. Again we must point out that the discussion in the *Gardner* cases of what flights give rise to a cause of action is dicta and not determinative of the issues here. Therefore, we believe that the Findings of Fact made by the Viewers and their conclusion that there was a "taking" are entirely consistent under the law as stated in the cases cited.

The defendant has also excepted to the Viewers' Finding that the "taking" of plaintiff's property occurred on June 1, 1952, the date the airport was opened to public use. They assert that such a finding is in conflict with the decisions of the Supreme Court in both *Gardner* cases, *supra*, and [fol. 256] that to determine that a "taking" took place by reason of the mere opening of the airport is to completely disregard the Supreme Court's holding that the nature, character, frequency and permanency of the flights must be considered.

It appears to be correct that on June 1, 1952, no flights in or out of the airport had taken place and certainly no definite flight pattern had developed. The dimensions of the flight pattern, about which the plaintiff complains, were developed only after the facilities were in use and many landings and take-offs had been made. To this extent the "taking" by the County could have occurred only after the nature, character, frequency and permanency of the flights were definitely ascertained.

The Viewers were faced, however, with the problem of fixing a date when the "taking" took place, and in their search for a solution to this problem they chose the only certain date available to them, the date of the opening of the airport. The only other alternative was to choose a later date at random, after first finding that a sufficient number of flights had been made to provide a detailed picture of the air traffic. This choice, however, would only have served to push the problem facing the Viewers one step further away, for they would then be called upon to determine at what hour on what day the flight pattern which constituted the "taking" crystallized.

[fol. 257] The Viewers made the only definitive choice. They did not arbitrarily choose June 1, 1952, at the outset of the hearings and before testimony as to the nature and frequency of the flights was introduced and then go on to provide their calendar skeleton with the flesh of testimonial detail. Rather, the Viewers heard all testimony concerning the landings and take-offs, determined from that testimony that there had been a "taking," and then ascribed a date to that "taking" which was definite and logical. Under these circumstances, we do not believe that the testimony as to the nature, character, frequency and permanency of the flights, even though it related to flights after June 1, 1952, is either irrelevant or immaterial as defendant contends.

We believe plaintiff's exception to the award of the Viewers should be sustained and defendant's exceptions dismissed.

IN THE COURT OF COMMON PLEAS

ORDER OF COURT REFERRING MATTER BACK TO BOARD OF
VIEWERS—February 10, 1960

And Now, to-wit, February 10, 1960, it is ordered, adjudged and decreed that plaintiff's exception to an award by the Viewers in the amount of \$12,690 be sustained. It is further directed that this matter be referred back to the Viewers for reconsideration and action as defined in this opinion.

[fol. 258] It is also ordered, adjudged and decreed that defendant's exceptions to Findings of Fact made by the Viewers be dismissed.

By the Court, Soffel, J.

Et die exception noted and bill sealed.

Soffel, J. [Seal]

IN THE COURT OF COMMON PLEAS

SUPPLEMENTAL REPORT OF VIEWERS—Filed March 2, 1960

Conforming to your Honorable Court's direction to reconsider and discuss the factors upon which the Board of Viewers predicated its opinion of the amount of damages awarded to plaintiff, the members respectfully state:

That they viewed the property on June 24, 1958, but due to time of day and wind conditions no flights of aircraft were observed using the runway glide angle affecting said property. However, on subsequent visits to the property for observation and after "views" of other "takings" for airport navigational, runway and general purposes they observed and heard flights of single and multi-engine aircraft over plaintiff's property in the glide angle for both take-off and let-down at times of heavy and light to moderate air traffic.

[fol. 259] That during the numerous observations and subsequent thereto they concerned themselves with the effect of flights on plaintiff's property considering, inter alia, the frequency of low-flying and the attendant proximity damages such as fear of disaster, noise, vibration, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner Griggs as previously assigned in recorded Report of Viewers, which unfortunately was unavailable to the Court at argument and decision time due to misfiling and misplacing.

That since 1955 they have viewed, heard valuation testimony of expert witnesses and made damage awards and benefit assessments on upwards of 200 properties condemned for Airport purposes as well as those for highway, petroleum pipelines and water line construction in the general and immediate vicinity of plaintiff's property.

That they have familiarized themselves with sales and holding prices of property in the general area of the Airport; the topography, airport and township zoning, road locations, commercial and residential areas; locations of market places, churches and their denominations, schools, police and fire facilities, transportation; all available printed material by the U. S. government, the airplane in-

dustry and real estate appraisers relating to effect of airport approach on neighboring properties; and authoritative [fol. 260] books treating on flight procedure for aircraft take-off and let-down, the frequency of motor failure and the percentage of resulting disastrous effects, navigational problems, and other pertinent information.

All of the foregoing factors, including the "Findings of Facts" are basic to and part of the Viewers Report (Supra)

DISCUSSION

Viewers are freeholders who are sworn to report damages or benefits, as the case may be, to the appointing Court. In the performance of this duty they

"may resort to any source of information which the members of it may think proper—even the evidence of their senses";

Spring Garden Streets Case 4 Rawle 192

They examine the property and observe the nature and quantity of land affected and are directed by the statutes to hear witnesses, if any appear after due notice. Their powers and duties are as an "inquest" (Patten v. The Susquehanna R. R., 1 Pearson 48, 49, 51 & 53) at common law and no statutory or judicial limitation has ever curtailed or threatened to curtail those investigatory and fact finding duties until the unprecedented restraint first appearing in Cowan v. Bunting Glider Co., 159 Pa. Super. 573, later [fol. 261] adopted by the Supreme Court in Avins v. Commonwealth, 379 Pa. 202 at 205:

"The limitation upon the triers of fact in condemnation cases with respect to the permissible source of their information is the same whether they be 'judges, jurors, viewers, boards or commissions'."

At the hearings whether on In Limine Petition (Powell Appeal, 385 Pa. 467, 474; Petition of Wynn, Common Pleas of Allegheny County, 739 Jan. 1957 affirmed 188 Pa. Super. 499) or on regular petition the Viewers follow trial procedure of the Courts for

"it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of damages or assessment of benefits: see case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191 . . . ' (The Viewers) were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the Sessions.' "

Gardner v. Allegheny County, 393 Pa. 120, 130 (1958)

Witnesses are heard and their competency and the weight and relevancy of their testimony is determined. In the instant case the Viewers heard Mr. McDowell, plain-[fol. 262] tiff's real estate expert, both on direct and cross-examination, individually cognizant of his excellent reputation as a citizen and exceptional qualifications. His opinion was neither impeached nor contradicted. The County of Allegheny offered not a scintilla of evidence except to supply documents on request of plaintiff or the Viewers. It "rested" after conclusion of plaintiff's case.

During the Viewers deliberations it was evident to the Chairman that the members could not accept witness McDowell's estimate of damage. Notwithstanding the case of Avins v. Commonwealth (Supra), and relying on the existing law of Spring Garden Streets Case (Supra) supplemented by Crumrine v. Washington County Housing Authority, 376 Pa. 234, at (238)

"Opinion testimony may be of value and it may be of no value, just as it appeals to the jury. In all such matters the jury must be left to the free exercise of its own judgment. It cannot be bound by the opinion of the witnesses or the instruction of the Court. It may reject in toto or in part the opinion of any witness it disbelieves, and this whether that opinion is contradicted or not"

the Chairman advised the Board Members that under those circumstances they should arrive at an amount which in [fol. 263] their opinions would be just compensation.

It is most respectfully submitted that the Viewers have given this case their most careful and thoughtful consideration both as to law and facts; and, after additional reconsideration, they herewith advise your Honorable Court that not one has deviated in his opinion as to amount of just compensation awarded to the plaintiff.

T. P. Trimble, Jr., Thos. M. Conrad, Paul G. McAtee,
Viewers.

IN THE COURT OF COMMON PLEAS

OPINION— Filed March 8, 1960

Per Curiam

This case came before the Court on Exceptions to the Report of the Board of Viewers awarding damages in the sum of \$12,600 to the plaintiff for the taking of a superterranean easement above plaintiff's property. The plaintiff filed one exception directed to the amount of damages awarded. The defendant filed exceptions attacking, inter alia, the jurisdiction of the Court. After hearing the argument of both sides and examination of briefs, the Court dismissed defendant's exceptions and sustained the plaintiff's exception. In its Opinion, the Court said: "We believe the question of the amount awarded should be referred back to the Board of Viewers for reconsideration and discussion of the factors upon which the award was predicated." The case was then sent back to the Board of Viewers which was directed to reconsider and state the factors which it considered in making the award. This requirement has now been met in its Supplemental Report.

At the time this case was argued before the Court en Banc, the Court was not informed that the Board of Viewers had supported its award by a written report setting forth Findings of Fact and Conclusions of Law. This report was not discussed by counsel, nor was it presented to the Court. This Report has since been examined. In accord with the Court's directions, the Board of Viewers has now filed a Supplemental Report. This sets forth in detail the view of the property by the Viewers, their observations

on the ground of the effect of flights on plaintiff's property, and the law applicable to a Board of Viewers in awarding damages or benefits.

Based on the original report of the Board of Viewers filed in this case and its supplemental report filed as directed by the Court, we are of the opinion that the plaintiff's exception must now be dismissed.

[fol. 20']

IN THE COURT OF COMMON PLEAS

ORDER OF COURT DISMISSING EXCEPTION TO REPORT OF
BOARD OF VIEWERS—March 8, 1960

And Now, to-wit, March 8, 1960 it is Ordered, Adjudged and Decreed that the Exception of the plaintiff to the Viewers' award be and it is hereby dismissed.

Per Curiam, W. McNaugher, Sara M. Soffel, Weiss.

Eo die, exception noted to the plaintiff, and bill sealed.

W. McNaugher [Seal], Sara M. Soffel [Seal],
Weiss [Seal].

[fol. 321]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 155 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY, Appellant

DOCKET ENTRIES

Appeal from the order entered February 10, 1960, of the Court of Common Pleas of Allegheny County at No. 2384 July Term, 1958.

March 7, 1960, Appeal and affidavit filed and writ exit, returnable last Monday of September, 1960.

March 9, 1960, Appearance for appellee, filed.

September 22, 1960, Record filed at No. 158.

September 29, 1960 Argued.

Decision

January 16, 1961

The order dismissing the County's exceptions to the viewers' report is reversed with directions that the viewers' report be vacated and set aside.

Jones, C. J.

Mr. Justice Bell files a Dissenting Opinion in which Mr. Justice Eagen joins.

January 25, 1961, Petition for reargument, filed.

February 6, 1961, Answer filed.

Order

Before Jones, C. J., and Bell, Musmanno, B. R. Jones, Bok and Eagen, JJ. (Cohen, J. absent).

February 15, 1961, reargument refused.

Per Curiam.

February 16, 1961 Remitted.

[fol. 322] March 23, 1961, Petition to return record pending action by the Supreme Court of the United States, filed.

March 23, 1961, Notice of appeal to Supreme Court filed.

Order

March 23, 1961, prayer of within petition granted.

By the Court
Jones, Chief Justice.

March 24, 1961, Supplemental Writ exit.

March 24, 1961, Record returned to this office.

For Appellant: Maurice Louik, County Solicitor, Francis A. Barry, First Asst., John W. Mamula, Second Assistant.

For Appellee: William A. Blair, David B. Fawcett.

[fol. 323]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 158 March Term, 1960

THOMAS N. GRIGGS, Appellant

v.

COUNTY OF ALLEGHENY

DOCKET ENTRIES

Appeal from the orders of February 10, 1960, and March 8, 1960, of the Court of Common Pleas of Allegheny County at No. 2384 July Term, 1958.

March 9, 1960, Appeal and affidavit filed and writ exit, returnable last Monday of September, 1960.

March 16, 1960, Appearance for appellee, filed.

September 22, 1960, Record and 2 volumes of testimony, filed.

September 29, 1960 Argued.

Decision

January 16, 1961

Appeal is dismissed.

Jones, C. J.

Mr. Justice Bell files a Dissenting Opinion in which Mr. Justice Eagen joins.

January 25, 1961, Petition for reargument, filed.

February 6, 1961, Answer filed.

Order

Before Jones, C. J. and Bell, Musmanno, B. R. Jones, Bok, and Eagen, JJ. (Cohen, J. absent).

February 15, 1961, reargument refused.

Per Curiam.

February 16, 1961 Remitted.

March 23, 1961, Petition to return record pending action by the Supreme Court of the United States, filed.

Order

March 23, 1961, Prayer of within petition granted.

By the Court

Jones, Chief Justice.

[fol. 324] March 24, 1961, Supplemental Writ exit.

March 24, 1961, Record returned to this office.

For Appellant: William A. Blair, David B. Fawcett.

For Appellee: Maurice Louik, County Solicitor, Francis A. Barry, First Asst., John W. Mamula, Second Asst.

[fol. 325]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 155 and 158 March Term, 1960

No. 155—Appeal of County of Allegheny

No. 158—Appeal of Thomas N. Griggs

THOMAS N. GRIGGS, Appellant,

v.

COUNTY OF ALLEGHENY, Appellant.

Appeals from Orders of the Court of Common Pleas
of Allegheny County at No. 2384 July Term, 1958.

OPINION OF THE COURT—Filed January 16, 1961

Jones, C. J.

These appeals grow out of a viewers' proceeding instituted by the plaintiff as owner of land neighboring the Greater Pittsburgh Airport to recover damages from the County of Allegheny, the owner and operator of the airport, for an alleged appropriation of the plaintiff's land because of a substantial interference with the use and enjoyment of it caused by flights of aircraft at low altitudes, through the air space above the land, when taking off or landing at the airport.

The Greater Pittsburgh Airport was opened for commercial air travel on June 1, 1952. At that time, Thomas N. Griggs, the plaintiff, was the owner of a nearby tract of land containing 19.161 acres improved with a house, two cottages, a four-car garage with living apartment overhead, and certain outbuildings. Part of the Griggs property lay under an "approach area" for the airport's northeast-southwest runway.

On May 29, 1958, Griggs petitioned the Court of Common Pleas of Allegheny County for the appointment of viewers to assess the damages caused by an alleged taking of his land by the County of Allegheny on June 1, 1952. The petitioner averred that, since the opening of the airport for commercial use, aircraft of several air lines, upon [fol. 326] taking off and landing at the airport, have frequently and continuously flown through the air space above his land at an elevation of less than 500 feet; that as the result of such flights, "the use and enjoyment of [his] property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest"; and that the property has been thereby "greatly damaged and depreciated in value."

The court appointed a board of view which sat for the purpose of its appointment, heard testimony offered by the claimant, and awarded him damages in the sum of \$12,690. Griggs filed exceptions to the viewers' report alleging that the viewers had unlawfully disregarded the expert testimony adduced by him as to the damages to his property which was the only testimony offered before the viewers on that issue. He also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard *de novo*. The County, contending that it was not liable for any damage allegedly suffered by the claimant, offered no testimony before the Board of Viewers on the issue of property value. The County filed exceptions to the viewers' award to Griggs setting forth therein that, based upon the viewers' findings of fact, there was no taking of Griggs' property by the County. The court below dismissed all exceptions of both parties from which action each of the parties took an appeal to this court pursuant to Section 2623 of the Second Class County Code of July 28, 1953, P.L. 723, 16 P.S. §5623.

It is clear that a property owner may petition the court for the appointment of viewers to assess and award damages against an entity clothed with the power of eminent domain where such entity effects a "taking" of the pe-

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tioner's property whether or not the appropriator has followed the statutorily provided condemnation procedure. [fol. 327] *Rosenblatt v. Pennsylvania Turnpike Commission*, 398 Pa. 111, 126-127, 157 A.2d 182; *Philadelphia Parkway*, 250 Pa. 257, 264-265, 95 Atl. 429; *Barron's Use v. United Railway Co.*, 93 Pa. Superior Ct. 555, 557-558. A "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. *Miller v. Beaver Falls*, 368 Pa. 189, 196-197, 82 A.2d 34; *Creasy v. Stevens*, 16 Fed. Supp. 404, 410-412.

Paragraph 12 of Griggs' petition for the appointment of viewers admits that the county has not condemned his land by way of the statutorily authorized procedure.¹

What the claimant attempted to show at the hearing before the viewers was that the county had substantially deprived him of the beneficial use and enjoyment of his property. Assuming, for present purposes, that he has shown a substantial deprivation of the beneficial use and enjoyment of his property, we shall proceed at once to a consideration of the basic question raised by the county's appeal as to whether such deprivation was, as a matter of law, caused by the County of Allegheny.

The County, relying on findings of fact by the viewers that no flights of aircraft were shown to be in violation of any regulation of the Civil Aeronautics Administration and that no flights were shown to be lower than necessary for a safe landing or take-off, contends that all of the complained of flights were through air space which the United States Congress placed within the public domain and that, therefore, any taking of Griggs' property was by the federal government and not by the County of Allegheny.

[fol. 328] Section 10 of the Air Commerce Act of May 20, 1926, 44 Stat. 568, as amended, 49 U.S.C.A., §180, provides as follows: "As used in this Act, the term 'navigable air-

¹ Section 14 of the Airport Zoning Act of April 17, 1945, P.L. 237, 2 P.S. §1563, confers upon political subdivisions the power to condemn air aviation easements and other estates in property for the purpose of providing approach protection for aircraft.

space' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections."

Section 3 of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 973, 49 U.S.C.A., §403, states that "There is recognized and declared to exist in behalf of ~~any~~ citizen of the United States a public right of freedom of transit in air commerce through the *navigable air space* of the United States." [Emphasis supplied.]

Section 1 (24) of the Act, 49 U.S.C.A., §401 (24), defines "navigable air space" as follows: "'Navigable air space' means air space above the minimum altitudes of flight prescribed by regulations issued under this Act."

Pursuant to authority granted by the Civil Aeronautics Act of 1938, the Civil Aeronautics Board issued Civil Air Regulations (14 C.F.R., Parts 1-190). Among these Regulations, Section 60.17, Part 60 (Air Traffic Rules), which establishes minimum safe altitudes of flight at 1000 feet over congested areas and 500 feet over other than congested areas, is prefaced with the following: "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:". The County of Allegheny contends that this exception means that minimum safe altitudes of flight for take-offs and landings have been established at the heights necessary for these purposes.² The County concludes, therefore, [fol. 329] that the "navigable air space" which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.

While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States v. Causby*, 328 U.S. 256 (1946). The decision in that case upheld the claimant's right to damages from the United States for a taking of certain of his

² This is now the position of the Civil Aeronautics Board. Civil Air Regulations, Interpretation 1, 19 F.R. 4602, July 27, 1954.

property located near an airport because of a substantial interference with his use and enjoyment of it by low flights of U. S. military planes, when taking off from or landing at the airport. In answer to an argument similar to that which the County of Allegheny makes here, the Supreme Court said (at pp. 263-264), "The fact that the path of glide taken by the planes was approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C., sec. 180. If that agency prescribed 83 feet [the height at which the planes passed over Causby's land] as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, sections 61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. *Id.* Pt. 60, sections 60.350-[fol. 330] 60.3505, Fed. Reg. Cum. Supp., *supra*. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight."²

² The Supreme Court of Washington recently rejected the identical argument, based upon Section 60.17, Part 60, of the Civil Air

Thus, the Supreme Court has held that the navigable air space which Congress placed in the public domain does not include the path of glide for an airplane's take-off or landing. As we are, of course, bound by the Supreme Court's interpretation of the federal statutes involved, we are, perforce, required to reject the County's contention that navigable air space, as employed by Congress, includes the area necessary for an airplane's take-off or landing in safety.*

[fol. 331] But, even though the complained of flights were not through air space which was part of the public domain, the record does not show that the County of Allegheny was the efficient legal cause of any damage resulting from the flights. Griggs testified at the hearing before the viewers that the airplanes of several commercial airlines flew over his land at low altitudes. But, he offered no proof, however, that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that "There is no evidence of any control exercised over any aircraft by the County of Allegheny." That finding, supported as it is by the record, precludes the claimant from recovering against the County in this proceeding.

In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in

Regulations, that the County of Allegheny is now pressing upon us, quoting this paragraph from *United States v. Causby*, supra. *Ackerman v. Port of Seattle*, 348 P.2d 664 (1960).

* Congress moved to counteract the effect of the decision in *United States v. Causby*, supra, by enacting the Federal Aviation Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, 49 U.S.C.A., §1301 et seq., Section 1401(b) whereof repealed the Civil Aeronautics Act of 1938. Section 104 of the later Act, 49 U.S.C.A., §1304, provides that, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." And, Section 101 (24), 49 U.S.C.A., §1301 (24), declares that (as used in the Act), "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." [Emphasis supplied.]

compliance with rules and regulations of the Civil Aeronautics Authority, drafted a "Master Plan" showing an "approach area" over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of aviation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise.

It is true that in *United States v. Causby*, supra, the United States was held to have effected a taking of certain property neighboring an airport. But there the United States owned and its agents operated the aircraft which caused the deprivation of the owner's use and enjoyment of the neighboring property. The airport itself was owned by the Greensboro-High Point Municipal Authority, which had leased to the United States Government the right to use the field "concurrently, jointly, and in common" with other users. The Supreme Court in the *Causby* [fol. 332] opinion did not indicate who actually maintained and operated the airport, evidently considering this point irrelevant.

For Griggs to make use of *United States v. Causby*, supra, as a precedent, it would seem that he should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. §1469, which provides, in part, as follows: "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Commercial air lines are not, of course, clothed with the power of eminent domain and cannot, therefore, be pro-

ceeded against by a complaining land owner through a viewers' proceeding for the assessment of damages for a taking of his property.

In view of our conclusion herein that there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, the question raised by the plaintiff's appeal has become moot.

The order dismissing the County's exceptions to the viewers' report on appeal at No. 155 is reversed with directions that the viewers' report be vacated and set aside.

Plaintiff's appeal at No. 158 is dismissed.

Mr. Justice Bell files a dissenting opinion in which Mr. Justice Eagen joins.

[fol. 333]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

Nos. 155 and 158 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

Appeal of Thomas N. Griggs from the Order of the Court of Common Pleas of Allegheny County of March 8, 1960 at No. 2384 July Term, 1958.

Appeal of County from the Order of the Court of Common Pleas of Allegheny County of February 10, 1960, at No. 2384 July Term, 1958.

DISSENTING OPINION—Filed January 16, 1961

Bell, J.

In *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. 2d 491, the Court analyzed and reviewed at length a number of the problems arising out of flight of aircraft over privately owned lands and held inter alia (page 116): first,

"It is clear as crystal under the authority of *United States v. Causby* [328 U.S. 256] that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of the land amount to a 'taking'." And secondly, that a Court of Equity has no power or jurisdiction to assess damages for a taking, but damages for property taken, injured or destroyed lies in proceedings before the Board of View. In that decision we did not decide who were proper defendants. The plaintiff, relying on the *Gardner* case, brought proceedings before the Board of View and proved that the flights were so low and so frequent as to be a direct and immediate interference with the enjoyment and the use of his land and hence amounted to a taking for which he was entitled to recover damages in eminent domain proceedings before the Board of View.

[fol. 334] The Viewers found, inter alia, that "The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 1201 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

"The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a country estate. We determine the 'after' diminished value of the property as being directly and immediately caused by

frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of \$12,690.00."

Defendant appealed because it believed it had no liability. Plaintiff appealed because he believed the award of damages was inadequate. The two basic questions involved are (1) whether the County of Allegheny had any liability for the damages which plaintiff unquestionably suffered and (2) if so, what was the date of the taking and subsidiarily were the damages inadequate?

The County of Allegheny acquired the Greater Pittsburgh Airport and all the land included in and/or surrounding the airport, as well as air rights and/or easements by eminent domain, pursuant to the Act of May 21, 1923, P.L. 295, and the Second Class County Code of July [fol. 335] 28, 1953, P.L. 723, §2633, 16 PS §5623. The Airport was opened for commercial flights on July 1, 1952. The County not only owned the Airport, but it also constructed the buildings thereon and the landing fields and the runways to the airport. It also owed a duty to repair and maintain them. It leased the land and facilities for commercial flights to various airlines. Furthermore, the County knew that the approach and the path of glide or the descent path and the airlines themselves were in minute detail regulated, prescribed and directed how, when and where to fly, how, when and where to approach, and land and take off, by an independent Governmental Agency known as the Federal Aviation Agency and the Civil Aeronautics Board.

Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their

home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "if we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, *inter alia*, that at the Griggs' property the surface of the approach area is only 11.86 feet above plaintiff's residence. [fol. 336] There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property.

There are five possible solutions: (1) No recovery—*damnum absque injuria*, like cases where property owners along a railroad track cannot recover for the noise and smoke which inconveniences and upsets them. (2) The United States is liable because (a) it furnished funds to the County of Allegheny to help pay for the acquisition and construction of this airport, and (b) it approved by a contract the County's acquisition of and its master plan for this airport, and (c) it regulates and minutely orders and directs through the Civil Aeronautics Board the take-offs and landings and path of glide of all planes entering and leaving the airport. (3) The airlines which fly some or many of the flights which injure plaintiff's property and interfere with or jeopardize its existence and the safety of plaintiff and others lawfully thereon. (4) The County of Allegheny which acquired by eminent domain the ownership of the property and constructed the airport, the buildings, the approaches and runways, all of which it must maintain at its expense, leases and (to some extent) operates the airport. It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family.

It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, Section 8 of the Constitution of Pennsylvania provides: "Municipal and [fol. 337] other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation *for property taken, injured** or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." The Constitution of the United States, Article V, similarly provides: "... nor shall private property be taken for public use, without just compensation."

We agree that the evidence clearly shows that there was a "taking" of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a "taking" of plaintiff's entire property.

In *Miller v. Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, the Court said (pages 196-197):

"... 'The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that *when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property*, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed . . . "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, [fol. 338] pro tanto, taken, and he is entitled to compensation*"' [*Cheves v. Whitehead*, 1 F. Supp. 321]: 11 McQuillin, *Municipal Corporations* (3rd ed.) §32.26, p. 312. As the Court of Appeals of New York, in *Forster v. Scott*, 136

*Italics throughout, ours.

N.Y. 577, 32 N.E. 976, . . . so aptly said (page 584): ' . . . All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. . . . '

" . . . [As] Mr. Justice, later Chief Justice SCHAFER, in his opinion, after calling attention to the provisions of the Constitution of Pennsylvania, said (page 490): 'The Governing principle is accurately stated in 20 Corpus Juris, 566, "There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking for which compensation must be made to the owner of the property." ' "

Airplanes and airports are of modern origin. The problems which have arisen in connection with airports and aircraft and air travel were unknown to the Common Law and in reality arose for the first time in the 1920s, or thereafter. Until the opening of the air age the owner of real property owned from the surface (or below) to the sky—*cujus est solum ejus est usque ad coelum*. That principle has been very substantially modified. It is now held that the owner of land owns from the surface (or lower regions) to the upper reaches and regions of the air to whatever heights may be needed for use and the enjoyment of his property. In considering the problems created by the air age, we are faced with the task of reconciling traditional common law concepts with the realities of modern day life. In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bed-[fol. 339] rocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization. We must not allow, in the appealing name of progress or general welfare, a property owner to be deprived by the Federal, State or County Government, or by anyone, of his property or any rights accruing therein and therefrom.

As Mr. Justice HOLMES said in his opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415-416, 43 S. Ct.

158 (in which he declared the Kohler Act of May 27, 1921, P.L. 1198 unconstitutional): "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"

The contention that the County is exempt from liability (a) because the air space is a few feet above plaintiff's property and within the public domain, and (b) whatever injury or damage was caused was caused by the airplanes, and (c) because the appropriate Federal Agency authorized the flights, is without merit. The United States Supreme Court [fol. 340] in *United States v. Causby*, 328 U.S. 256, has rejected these contentions. There, the Court, speaking through Mr. Justice DOUGLAS, pertinently said (pages 263-265):

"The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C. §180. If that agency prescribed 83 feet as the minimum safe altitude, then we could have presented the question of the validity of the regulation. But nothing of the sort has been done. *The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is*

not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain. Id., Pt. 60, §§60.350-60.3505, Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that *in that event there would be a taking*. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms [fol. 341] of one of them—the minimum safe altitudes of flight.

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, *the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it*. We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure

rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used. *The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his [fol. 342] ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*" •

Moreover, an airport is like a bridge; the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County*, 78 Pa. 458; *Knoll v. Harborcreek Township*, 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls*, supra; *United States v. Causby*, 328 U.S. 256; *Ackerman v. Port of Seattle*, 329 Pac. 2d 210, 348 Pac. 2d 664.

Even if it be conceded arguendo that the air space in question, namely, 12 feet above plaintiff's home and buildings, is a part of the public domain, it could not, *under the Constitution* and under *United States v. Causby*, be taken for public use without proper compensation. Not only is it unsafe for the planes, but it seriously jeopardizes the health and safety of plaintiff and his family and guests and constitutes not only an unreasonable interference with his property, but also amounts to a nuisance.

The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in

• Under facts on all fours with the facts in the instant case, our sister states have held that an injunction will issue against a city or county which owns or operates an airport, on the ground that flights which jeopardize the health, safety or property of a landowner amount to a nuisance: *City of Phoenix v. Harlan*, 75 Ariz. 290, 255 P. 2d 609; *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472; *Delta Air Corporation v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245.

the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically impossible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They follow implicitly the law, the regulations and the orders of the Government of [fol. 343] the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their take-offs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month or year it occurred. Moreover, if he or a member of his family or employee were sitting and watching outside his home, how could he or they know, even with an interspace telephone, exactly what was happening at a particular moment to the owner's wife or those inside his home, and exactly what was happening at that particular moment to the walls, ceilings, plaster and insides of his house, and which Airline caused what?

There is likewise no merit in the County's last two contentions. The fact that the Civil Aeronautics Board or other Federal Authority approved the flights in question is irrelevant and immaterial in the present case, although it may be relevant in cases where the facts are substantially different. Although we believe that the airspace in question, i.e., 12 feet above plaintiff's home, is not a part of the public domain—Federal, State, local or otherwise—even if it were, its appropriation and use for planes flying into and out of this airport at that height would amount to a "taking" of plaintiff's property. *United States v. Causby* and cases *supra*.

In *Ackerman v. Port of Seattle*, *supra*, the Supreme Court of Washington decided that the Airport owned by [fol. 344] the Port of Seattle was liable in damages for a "taking" which resulted from low flights into the Airport

in accordance with Federally prescribed regulations or orders. Washington has the same Constitutional provision as does the Commonwealth of Pennsylvania in regard to compensation for private property taken, injured or destroyed. That Court held specifically that rights in the normal approach area which caused fear, anxiety and apprehension constituted an unreasonable interference with plaintiff's property and amounted to a "taking" by the Port of Seattle. In the course of its opinions that Court aptly said (329 P. 2d, page 216, 221 and 348 P. 2d, page 611):

"... if the state first declared certain private lands to be public domain and then built a road thereon, it is quite apparent that there would be a violation of Art. I, §16, amendment 9, of the Washington constitution. We believe this is as true with space in the air as it is with the surface of land. The government simply cannot arbitrarily declare that all of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owners' claims for any and all possible damages....

"... under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate,...."

"This interpretation of Congress' declaration as to what constitutes public domain in the airspace is supported by the Federal government's policy of condemning and compensating for air easements over property adjoining Federal air bases. See *United States v. 48.10 Acres of Land, etc.*, D.C.S.D.N.Y. 1956, 144 F. Supp. 567*.... Clearly, [fol. 345] *an adequate approach way* is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport.

* The City of Philadelphia similarly acquires by purchase or otherwise air rights over properties adjacent to its International Airport in order to comply with the Constitution of Pennsylvania and the Constitution of the United States.

The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip."

Finally, the fact that the Civil Aeronautics Board approved the plan for the airport will not relieve the County which is the owner of the airport and the adjoining land. If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by *United States v. Causby*, supra, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, inter alia, the following:

"(i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, take-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a Zoning Ordinance and regulations, or by the acquisition of easements or other interests in land or airspace, or by both such methods."

[fol. 346] The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably by the terms of this contract that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of *sic utere tuo ut alienum non laedas*, and (2) under the *United States v. Causby* case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America.*

* Per the Administrator of Civil Aeronautics.

The Viewers determined the taking of plaintiff's property as of the opening of the Airport June 1, 1952, pursuant to a prior County ordinance. The great difficulty which arises because of the complexity of the facts in this case is instantly apparent, and it is virtually a practical impossibility to fix any other date for the taking. We cannot say that the date which the Viewers found constituted a taking was erroneous. Moreover, in view of the conflicting testimony and the inherent difficulty of appraising and fixing the damage which plaintiffs suffered, we cannot say that the Viewers erred in their verdict.

I would affirm the Orders of the lower Court.

Mr. Justice Eagen joins in this dissenting opinion.

[fol. 347] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 348]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 155 March Term, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

Supplemental Brief and Appendix

Appeal of County of Allegheny from the Order of the
Court of Common Pleas of Allegheny County
of March 8, 1960 at No. 2384
July Term, 1958

[fol. 349]

AMENDMENT TO GRANT AGREEMENT

Greater Pittsburgh Airport
Allegheny County, Pennsylvania
Project No. 9-36-029-801

Whereas, the Administrator of Civil Aeronautics has determined that, in the interest of the United States, the Grant Agreement between the Administrator of Civil Aeronautics, acting for and on behalf of the United States, and the County of Allegheny, Pennsylvania, accepted by said County of Allegheny on the 22nd day of June, 1948, should be amended as hereinafter provided:

Now, Therefore, Witnesseth:

That, in consideration of the benefits to accrue to the parties hereto, the Administrator of Civil Aeronautics, on behalf of the United States, on the one part, and the County of Allegheny, Pennsylvania, on the other part, do hereby mutually agree that the Grant Agreement accepted by the Sponsor under date of June 22, 1948, be and the same is hereby amended by adding thereto as paragraph 8 of the following provisions:

8. (a) It is hereby understood and agreed that the Sponsor's Assurance Agreement incorporated in and constituting part of this Grant Agreement is hereby amended by deleting subsections (b) through (o) of Section 1 thereof, and inserting in lieu thereof the following:

[fol. 350] "(b) These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal-aid for the Project or any portion thereof, made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty

years from the date of said acceptance of an offer of Federal-aid for the Project.

- (c) The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes: Provided, That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: And provided further, That the Sponsor may prohibit any given type, kind or class of aeronautical needs of the area served by the Airport.
- (d) The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or corporation to exercise, any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.
- (e) The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability

and effect), the Sponsor specifically covenants and agrees:

[fol. 352] (1) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials, or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

- (a) To furnish good, prompt and efficient service adequate to meet all the demands for its service at the Airport,
- (b) To furnish said service on a fair, equal and non-discriminatory basis to all users thereof, and
- (c) To charge fair, reasonable and non-discriminatory prices for each unit of sale or service: Provided, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

[fol. 353] (2) That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from:

- (a) Performing any service on its own aircraft with its own employees (including, but not limited to maintenance and and repair) that it may choose to perform,
- (b) Purchasing off the Airport and having delivered on the Airport without entrance fee, delivery fee or other surcharge for delivery any parts, materials or supplies necessary for the servicing,

repair or operation of its aircraft: Provided, That the Sponsor may make reasonable charges for the cost of any service (including charges for maintenance, operation and depreciation of facilities and rights-of-way) furnished by the Sponsor in connection with the delivery of any parts, materials or supplies: And provided further, That in case of aviation gasoline and oil purchased off the Airport and delivered to the Airport, the Sponsor may require the aviation gasoline and oil to be stored in specified places, limiting the amount delivered to the amount of storage space available, and if necessary for the safe and efficient operation of the Airport, require persons furnishing their own aviation gasoline and oil to utilize such storage, dispensing and delivery system as the Sponsor may designate.

- (3) That if it exercises any of the rights or privileges set forth in subsection (1) of this paragraph it will be bound by and adhere to the conditions specified for contractors set forth in said subsection (1).
- (f) Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of non-aviation products and supplies or any service of a non-aeronautical nature.
- [fol. 355] (g) The Sponsor will suitably operate and maintain the Airport and all facilities thereon or connected therewith which are necessary for airport purposes other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for aeronautical purposes: Provided, That nothing contained herein shall be construed

to require that the Airport be operated and maintained for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere substantially with such operation and maintenance. Essential facilities, including night lighting systems, when installed, will be operated in such a manner as to assure their availability to all users of the Airport.

- (h) To the extent of its financial ability, the Sponsor will replace and repair all buildings, structures, and facilities developed under the Project which are destroyed or damaged, replacing or restoring them to a condition comparable to that preceding the destruction or damage, if such buildings, structures, and facilities are determined by [fol. 356] the Administrator to be necessary for the normal operation of the Airport.
- (i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked

or lighted. The airport approach standards to be [fol. 357] followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

- (j) All facilities of the Airport developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefor shall be determined by the Sponsor and the using agency.
- (k) The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any [fol. 358] airport air traffic control activities, weather-reporting activities, and communications activities related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.
- (l) After completion of the Project and during the term of these covenants, the Sponsor will maintain a current system of Airport accounts and records, using a system of its own choice, sufficient to provide annual statements of income and expense. It will furnish the Administrator with such annual or special Airport financial

and operational reports as he may reasonably request. Such reports may be submitted to the Administrator on forms furnished by him, or may be submitted in such other manner as the Sponsor elects, provided the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be available for inspection by any duly authorized representative of the Administrator upon reasonable request. The Sponsor will furnish to the Administrator, upon request a true copy of any such document.

- (m) The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency eligible under the Act and the regulations to assume such obligations and having the power, authority and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient powers and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.
- (n) The Sponsor will maintain a master plan (layout) of the Airport having the current approval of the Administrator. Such plan shall show [fol. 360] building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan (layout) in making any future improvements or changes at the Airport which, if made contrary to the master plan

(layout), might adversely affect the safety, utility, or efficiency of the Airport."

and by renumbering subsection (p) of said Section 1, subsection (o).

In Witness Whereof, the parties hereto have hereby caused this amendment to said Grant Agreement to be duly executed as of the 21st day of September, 1948.

United States of America, Administrator of Civil Aeronautics, By Ora W. Young, Regional Administrator, Region I.

Allegheny County, Pennsylvania, By John J. Kane, Title, Chairman Board of County Commissioners.

[Seal]

Attest: M. N. Snyder, Title: Chief Clerk.

[fol. 361]

CERTIFICATE OF SPONSOR'S ATTORNEY

I, Nathaniel K. Beck, acting as Attorney for the County of Allegheny, Pennsylvania, do hereby certify:

That I have examined the foregoing Amendment to Grant Agreement and the proceedings taken by said County of Allegheny, Pennsylvania, relating thereto, and find that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Pennsylvania, and further that, in my opinion, said Amendment to Grant Agreement constitutes a legal and binding obligation of the County of Allegheny, Pennsylvania, in accordance with the terms thereof.

Dated at Pittsburgh, Pa., this 25th day of September, 1948.

Nathaniel K. Beck, Title: County Solicitor.

[fol. 362]

SUPREME COURT OF THE UNITED STATES

No. 910, October Term, 1960

THOMAS N. GRIGGS, Petitioner,

vs.

COUNTY OF ALLEGHENY.

ORDER ALLOWING CERTIORARI—June 5, 1961

The petition herein for a writ of certiorari to the Supreme Court of the Commonwealth of Pennsylvania, Western District is granted. The case is transferred to the summary calendar and set for argument immediately following No. 881.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE
Supreme Court of the United States

..... **TERM, 1961**

NO. ~~930~~ 81

THOMAS N. GRIGGS
v.
COUNTY OF ALLEGHENY

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA**

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IN THE
Supreme Court of the United States

..... **TERM, 1961**

NO.

THOMAS N. GRIGGS
v.
COUNTY OF ALLEGHENY

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court
of the United States:*

The Petitioner, Thomas N. Griggs, prays that a Writ of Certiorari issue to review the decision of the Supreme Court of Pennsylvania which reversed the Order of the Common Pleas Court (dismissing Exceptions to the Viewers' Report in Condemnation) with directions to vacate and set aside the Viewers' Report making an award of condemnation damages to Griggs and against the County of Allegheny.

OPINIONS OF THE COURTS BELOW

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 402 Pa. 411 and 420, respectively, and appear in the Appendix

Question Involved.

page 27 and page 38. The opinions of the Court of Common Pleas of Allegheny County are reported at 108 P. L. J. 65 and they, together with the Report of the Board of Viewers (unreported) are included at pages 236a, 263a and 193a, respectively, of the Joint Record as printed for the Court below, nine copies of which Joint Record are filed herewith.

Also printed in the Appendix (page 52) is the opinion of the Supreme Court of Pennsylvania in the case of *Gardner v. County of Allegheny; Trans World Air Lines, Inc.; Eastern Air Lines, Inc.; Northwest Airlines, Inc., Capital Airlines; The Allegheny Airline; North American Coach Systems, Inc.; Lake Central Air Lines*; reported at 393 Pa. 120. Companion cases to the Gardner case were filed in Equity by Griggs and others. This litigation is discussed hereinafter.

JURISDICTION

The decision of the Pennsylvania Court sought to be reviewed was entered January 16, 1961. The Order denying Reargument was entered February 15, 1961.

The jurisdiction of your Honorable Court is invoked under Title 28 U. S. C., Section 1257 (2) and (3).

QUESTION INVOLVED

Is it a violation of due process of the Fourteenth Amendment and/or of the Fifth Amendment to the Constitution of the United States for the County of Allegheny, a Pennsylvania municipal corporation, to knowingly plan, construct, own and operate the Greater Pittsburgh Airport for public use so that the bottom

Provisions Involved.

of the approach area (glide angle) necessary for the operation of the airport is within 12 feet of Petitioner's roof so that the resulting regular low flights of commercial planes over his property below the navigable airspace established by Congress endanger the life of Petitioner and others and destroy the use and enjoyment of his property where the County denies any liability to Petitioner therefor and the decision of the Pennsylvania Court ignores the Federal and Pennsylvania Constitutions and denies there is any taking of a superterranean easement on or property of Petitioner and expressly relegates Petitioner and all others similarly situated to the illusory and unconstitutional remedy of trespass actions against the owners and/or pilots of each aircraft using the glide path?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of the Fifth and Fourteenth Amendments to the Federal Constitution and Article 16, Section 8, of the Pennsylvania Constitution are reproduced in the Appendix. The applicable provisions of Sections 402 and 403 of the Pennsylvania Act of 1933, 2 Purdon's Stat. Ann., Sections 1468 and 1469; and the Pennsylvania Act of 1945, 2 Purdon's Stat. Ann., Section 1563; and the applicable portion of the Civil Air Regulations, 14 C.F.R. Part 60, Section 60.17, and the applicable sections of the Federal Statutes under which the Regulations are promulgated, are all reproduced in the Appendix.

*Statement of the Case.***STATEMENT OF THE CASE**

The case is concerned with the responsibility for the damage done to Petitioner's residence property by the necessary flights (below the navigable airspace) of commercial airplanes for take-off and landing at the County of Allegheny's Greater Pittsburgh Airport. The flights are performed in accordance with the air traffic regulations of the Civil Aeronautics Authority and pass over Petitioner's residence property so low below 500 feet that the effects are as Mr. Justice Bell, in the dissenting opinion of the Pennsylvania Supreme Court, said, at page 424 (App. 40):

"I am convinced that the evidence demonstrates that there was a 'taking' of plaintiff's entire property."

The Viewers in condemnation found in their Report that by reason of these necessary flights there was a taking by the County of Allegheny of a superterranean easement over Petitioner's property effective 12:01 A.M., June 1, 1952, the date the County Commissioners, by Resolution, designated for the opening of the Airport for public use (and when in fact it opened). The Viewers made an award for the Petitioner against the County. (The Report of the Viewers appears at pages 193a to 207a of the Joint Record in the Pennsylvania Court.) The Viewers found, inter alia, that the bottom of the approach area to the Northeast-Southwest runway is 11.36 feet above the roof of Petitioner's residence (R. 200a).

We are not concerned with disputes of fact, not only because the case proceeded thereafter only upon exceptions raising questions of law, but also because the

Concise Statement of Facts.

County offered no testimony before the Viewers. The Court of Common Pleas of Allegheny County ultimately dismissed all exceptions thereby sustaining the Viewers' Report. (The opinions of that Court appear at R. 236a and R. 263a.)

The Pennsylvania Supreme Court, on appeal, while it rejected the County's contentions, pages 416, vacated the Viewers' Report and award and said that Petitioner's relief should be obtained from the owners or operators of the aircraft (page 419) (App. 35). (We note in passing that the suggested relief is illusory. See page 430 (App. 47) of the opinion of Mr. Justice Bell.)

The dissenting opinion of Mr. Justice Bell ably sets forth the applicable law, the constitutional rights of Petitioner and for the most part recounts the facts. It appears to us to be supererogation to do more than respectfully refer you to his opinion, but we must meet the requirement of the rules.

CONCISE STATEMENT OF FACTS

The County of Allegheny acquired the land (R. 46a) and constructed the Airport, its landing field, buildings and runways at a cost in excess of thirty million dollars.

Under the Federal Airport Act, the County received immense Federal subsidies for construction by entering into Agreements with the United States (R. 197a-198a) whereby, in summary, the County agreed to abide by the rules of the Civil Aeronautics Administration; to maintain a Master Plan of the Airport including the "approach areas"; and to acquire such easements or other interests in lands or airspace as may be necessary "to

Concise Statement of Facts.

meet the airport approach standards established by the Administrator" (R 197a-198a).

The County established such a Plan, approved by the Administrator, including the approach areas for the various runways (R 198a).

Petitioner's property consisted of about 19.161 acres, with a residence and other buildings thereon (R 199a) and is situate on a hill to the northeast of the Northeast-Southwest airport runway.

The approach area as shown by the Master Plan was over Petitioner's residence, certain other buildings and about 6.1 acres of his land (R 199a). The elevation of his residence door sill was about 34 feet above the elevation of the end of the Airport runway and the bottom of the approach area its (slope on a 40-1 gradient) is less than 12 feet above the residence roof (R 199a-200a). In common parlance this means the bottom of the glide or climb angle is 12 feet above Petitioner's roof.

Some of Petitioner's trees project into the glide angle (R 64a) and, in the event of engine failure on take-off there was no course but to plow into Petitioner's house (R 70a). Nevertheless, the County did not condemn or otherwise acquire an aviation easement over the Petitioner's property. (Nor did it do so over the properties in companion cases, although in one of them the residence projected into the approach area.) The County had power under Section 14 of the Pennsylvania Airport Zoning Act of 1945, 2 P. S. 1563, to condemn air aviation easements and other estates in property for the purpose of providing approach protection for aircraft.

Concise Statement of Facts.

The County opened the Airport for public use on June 1, 1952, commencing (R 200a) with 236 scheduled flights a day (R 111a). This Airport is used by all commercial scheduled flights serving Pittsburgh and vicinity.

From June 1, 1952, the Northeast-Southwest runway has been in regular operational use for landing and take-off of commercial and other aircraft in regular flight patterns at heights over Petitioner's residence varying from 30 to 300 feet on take-off and from 53 to 153 feet on let down (R 200a). The noise on take-off is comparable to that of a riveting machine or steam hammer and on let down to that of a noisy factory (R 213a).

Some of the effects upon the Petitioner and his household are summarized by Mr. Justice Bell, at page 422, (App. 38), as follows:

"Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the mem-

Concise Statement of Facts.

bers of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, inter alia, that at the Griggs' property the surface of the approach area is only 11.86 feet above plaintiff's residence. There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property."

(The Record references are R 41a; 42a; 43a; 56a; 60a; 73a; 80a; 82a; 83a; 93a; 102a.)

Petitioner rented places to get some sleep (R. 60a-61a) and finally was compelled to move from his residence (R 201a).

For many months after the opening of the Airport, the Petitioner had discussions with representatives of the County, the commercial airlines and others, all of whom disclaimed responsibility. The Petitioner and others, not having the facts, plans, engineering and other information, filed the companion cases in Equity (described in opinion, page 53) and finally filed his Petition for the appointment of Viewers, utilizing certain information secured from the answers of the County and the Airlines in the Equity cases (e. g. R 11a).

Argument.**ARGUMENT**

The decision of the Pennsylvania Court deprives Petitioner of his rights under the Fifth and Fourteenth Amendments to the Constitution (as well as under the Pennsylvania Constitution) in that his property or a superterranean easement thereon has been taken for public use without compensation therefor.

We reiterate that the undisputed facts plainly show the taking, injury and destruction of Petitioner's property and the dissenting opinion of Mr. Justice Bell ably summarizes the invasion of the rights of Petitioner; at p. 424 (App. 40) :

"We agree that the evidence clearly shows that there was a 'taking' of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a 'taking' of plaintiff's entire property."

He further states, page 423 (App. 40) :

"It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, Section 8 of the Constitution of Pennsylvania provides:

'Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction.' The Constitution of the United States,

Argument.

Article V, similarly provides: '. . . nor shall private property be taken for public use, without just compensation.' "

It is plain that when Mr. Justice Bell inadvertently referred to Article V of the Federal Constitution, he meant the Fifth Amendment. It is unnecessary to cite cases to support the proposition that the Fourteenth Amendment to the Federal Constitution imposes the same restrictions upon States as the Fifth Amendment imposes upon Congress and the United States.

Your Honorable Court, in the case of *United States v. Causby*, 328 U. S. 256, decided that the flight of military planes landing at and taking off at an airport leased by the United States, constituted a taking within the Fifth Amendment for which the United States was liable. You said, pages 266, 267:

"Flights over private land are not a taking, unless they are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of fact of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."

Insofar as Petitioner knows, no other case involving taking by flights of aircraft has been before your Honorable Court, but the principles it established have been followed by the Federal Courts in many cases, including: *Highland Park, Inc. v. United States*, 161 F. Supp. 597; *Freeman v. United States*, 167 F. Supp. 541;

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Cravens v. United States, 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims*, decided October 8, 1958; *Ralph Dick et al. v. United States*, 169 F. Supp. 491; *Hopkins v. United States*, 173 F. Supp. 245 (Advanced report—July 13, 1959); and *United States v. Ashcraft, et al.*, 176 F. Supp. 447.

The principle so established has been cited with approbation in many State cases, e. g., in *Dlugas v. United Air Lines*, 53 D. & C. 402 (Pa. District and County Report), the law is thus stated:

"It may be observed in concluding . . . that the A.L. I. Restatement of the Law of Torts, Section 194, considers flights of aircraft over the lands of another to be privileged only if at a height so as not to interfere unreasonably with the possessor's enjoyment of the surface and the air space above it."

Under the authority of the Causby case, the Supreme Court of Washington, in the case of *Ackerman v. Port of Seattle*, 329 P.2d. 210, 348 P.2d. 664, decided that the Port of Seattle was liable for the taking of Ackerman's property by the necessary flights of commercial planes in landing and taking off at the Seattle airport. It is to be noted that the provisions of the Washington Constitution are identical to those of Pennsylvania, and both, of course, are similar to the applicable provisions of the Federal Constitution.

All the Justices of the Pennsylvania Court rejected the County's contention that the County was exempt from liability because the flights were in the navigable airspace and the flights were approved by the appropriate Federal Agency under the decision in the Causby case. See the majority opinion at page 416 (App. 32)

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and the dissenting opinion at pages 426 et seq. (App. 437).

At the time of the taking in the instant case, the Civil Air Regulations (14 C. F. R. Parts 1-190) Section 60.17 Part 60 (Air Traffic Rules) establish minimum safe altitudes of flight at 1,000 feet over congested areas and 500 feet over other than congested areas. At the time of the Causby case the minimum prescribed by the Regulations for air carriers was 500 feet during the day and 1,000 feet during the night. In the Causby case, your Honorable Court ruled that flights below these minimums were not within the navigable airspace which Congress placed within the public domain and, in speaking of flights on the path of glide, said, at page 264:

"Thus it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the Statute. The Civil Aeronautics Authority has, of course, the power to prescribe navigable airspace only in terms of one of them—the minimum safe altitudes of flight."

The Pennsylvania Court properly held under the Causby case that the flights were not within the navigable airspace. The majority opinion, however, as said by Mr. Justice Bell, page 429 (App. 46): "clearly implies that the injury or taking was by the Airlines", and the majority of the Court then does a curious thing. The majority of the Court does not deny the injury or taking, but exculpates the County from liability, saying, page 419 (App. 35):

"For Grigg's to make use of *United States v. Causby*, supra, as a precedent, it would seem that he should look for relief to the owners or operators

Argument.

of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P. L. 1011, 2 P.S. § 1469, which provides, in part, as follows: 'The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.'"

This is a plain evasion of the ruling in the Causby case that the flights constituted a taking for public use. The majority of the Court cannot contravene the facts of the taking so, in its zeal to exculpate the County of Allegheny, it places the liability upon the air carriers and pilots which have no power of eminent domain. In so doing, ignores the principle enunciated by Mr. Justice Bell, at page 429 (App. 46), as follows:

"Moreover, an airport is like a bridge, the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County*, 78 Pa. 458; *Knoll v. Harborcreek Township*, 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls*, supra; *United States v. Causby*, 328 U.S. 256; *Ackerman v. Port of Seattle*, 329 P. 2d 210, 348 P. 2d 664."

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We add that there would be no occasion for the planes to fly on the glide angles across Petitioner's property if the County had not constructed the Greater Pittsburgh Airport and the NE-SW runway where it did. It is true, also, that the Airport cannot be used for the public purpose for which it was constructed unless the planes can land and take off there.

The curious reasoning of the majority opinion enables an evasion of any discussion of Petitioner's rights under the State and Federal Constitutions. To give verisimilitude of respect for law the Court suggests relief for damages may be obtained against the owners and operators of the aircraft and dusts off Section 403 of the Pennsylvania Act of 1933; 2 P. S. 1439; adopted some thirteen years before the Pennsylvania Airport Zoning Act. This Section, we believe, by its plain terms, applies to injuries to persons or property by *trauma* from aircraft or object dropping therefrom. If the Section has the meaning suggested by the majority opinion, it is unconstitutional.

Moreover, Mr. Justice Bell ably points out at page 430 (App. 47) the suggested remedy is illusory and can give Petitioner no relief. It is not only impossible to record the facts as to the various flights of various airlines and the effects of these flights but it appears that legally the damage suffered by Petitioner never can be attributed or broken down among the individual flights. Neither the County nor the C. A. A. keeps any records as to the runway used by any flight or its height over Petitioner's property much less of the effect thereon. The recordings of the flight conversations in and out of the Airport are wiped out every thirtieth day (R 106a).

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The suggested remedy, however, is not the point. The facts plainly show there was a taking for public use. Under our Constitution neither a State Court by its decision nor a State Legislature by its enactment can exculpate the governmental body from liability or compensation for property for public use by saying the liability is elsewhere. A municipality cannot appropriate private property for a road or a bridge approach and be absolved of the liability because the State Court or the Legislature says that the owners and drivers of the automobiles who use the same are the parties liable.

Our position is ably summarized by Mr. Justice Bell at page 432 (App. 49):

"If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by *United States v. Causby*, supra, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, inter alia, the following: '(i) insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, take-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a Zoning Ordinance and regulations, or by the acquisition of easements or

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other interests in land or airspace, or by both such methods.' "

"The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably by *the terms of this contract* that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of *sic utere tuo ut alienum non laedas*, and (2) under the *United States v. Causby* case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America."

The State Court has plainly and improperly deprived Petitioner of his constitutional rights under both the State and Federal Constitutions.

**CONSTITUTIONAL ISSUES AS RAISED IN
THE STATE PROCEEDINGS**

In the entire Equity litigation (see Appendix A, page 53), the decision in the case of the *United States v. Causby*, 328 U.S. 258, was argued before the Court of Common Pleas of Allegheny County more than six times and discussed in briefs before the Supreme Court of Pennsylvania at least four times with oral arguments on at least three occasions. In the instant condemnation case, the whole matter was argued again before the Court of Common Pleas (R. 248a) and again before the Supreme Court of Pennsylvania as appears by the dissenting opinion of that Court. The constitutional matters as well as the lack of constitutionality of the decision of the majority of the Court and of the Pennsylvania Act of 1933 were again presented in the Petition for Reargument.

REASONS FOR GRANTING THE WRIT

I. The case is of extreme national importance. The decisions of the highest Courts of the two States which have decided the question are in direct conflict. While we believe the Causby case rules the matter, the Pennsylvania decision and the Washington decision (*Ackerman v. Port of Seattle, supra*) have reached opposite conclusions with respect to municipal liability for a taking by commercial flights landing and taking off at a municipal airport. The constitutional provisions of both States are identical and both are similar to the Fifth Amendment of the Federal Constitution. Insofar as Petitioner knows, your Honorable Court has decided no cases, other than the Causby case, with respect to the taking of property by the flight of planes. The Causby case involved the flight of military planes from an airport leased by the United States for use in common with others.

Condemnation proceedings are under State law and other actions by municipal authorities rarely meet the jurisdictional requirements of the Federal District Courts. Municipal airports and the problems arising therefrom are of concern in every State and in many of the municipalities if not all of them.

The Pennsylvania decision gives rise to the following questions, inter alia: What are the obligations of municipalities to condemn aviation easements where safety requires them or where the flights constitute a taking of private property? Are pilots and/or owners of aircraft liable for damages if they land or take off at public airports? What are the rights of property owners

Reasons for Granting the Writ.

whose property is taken, injured or destroyed by such flights? Is their remedy to enjoin the flights, thus stopping the public use and interrupting interstate commerce? (Injunction has been used in some cases.)

The Pennsylvania decision will be cited in State Courts throughout the country. It will be a long time before other State cases get to your Honorable Court for review.

What is the real solution in the public interest? Even if it be constitutionally possible to hold the owners and pilots of aircraft in interstate flights liable for damages, the remedy is illusory. The remedy by injunction is not a solution because by the time an injunction action is brought, the public investment is already in the airport. The real solution is to place the liability upon the municipalities who build the airports, thus applying the principles enunciated in the Causby case. The cost of the easements is a small addition to the airport cost, all of which is passed on by landing fees and rental charges to the airlines and by them in turn to the traveling public in the form of fares.

This is the proper solution to balance the constitutional rights of property owners with the public interest. As Mr. Justice Bell said, page 425, "In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bedrocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization."

The reversal of the decision of the Pennsylvania Court does not mean that all properties under the glide

Reasons for Granting the Writ.

angle are taken, injured or destroyed. The correct rule is as stated in the Causby case at page 266: "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."

In the Causby case the low glide angle flights passed over the property at a height of 83 feet. In the instant case at the height of 30 feet above Petitioner's roof. In the Causby case the flights were of military planes of the types and power in existence in 1942. In the instant case the flights are made by commercial aircraft of the type and size still in use, including Constellations.

II. The Pennsylvania Court decided the Federal question of substance contrary to the applicable decision of your Honorable Court in the Causby case.

In the Causby case, your Honorable Court decided that the flight of planes on the glide angle constituted a taking of Causby's property by the United States for which taking he was entitled to compensation under the Fifth Amendment. The plain gist of the decision was that there was a taking for public use.

It is true that in the opinion you said, page 264, "As we have said, the flight of airplanes which skim the surface but do not touch it, is as much an appropriation of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondent's property at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land."

Reasons for Granting the Writ.

The Pennsylvania Court followed the Causby decision in holding that the glide angle flights were not within the navigable airspace but it ignored completely that the plain intent of the Causby decision was that the flight of the planes in and out of the airport constituted a taking for public use.

The Pennsylvania Court, in order to evade any discussion of Petitioner's constitutional rights, completely ignored the decision in the Causby case that there was a taking for public use and placed the responsibility for the taking of Petitioner's property upon the commercial airlines which have no power of condemnation and cannot lawfully take nor appropriate property. The Pennsylvania Court chose to ignore not only the heart of the Causby decision but also the inherent facts that the approach areas to the runways of the Airport are as much a part of the public improvement as the runways themselves. There would be no occasion for glide angle flights over Petitioner's property with the resulting effects thereto if the County of Allegheny had not built the Airport and its Northeast-Southwest runway where it did just as in the Causby case there would have been no occasion for the flight of the military planes over the Causby property if the United States had not chosen to lease and operate the airport where it did.

III. The decision of the Pennsylvania Court encourages placing in jeopardy the safety of pilots, the traveling public, and property owners. Mr. Justice Bell in the dissenting opinion of the Pennsylvania Court states at page 422:

"Moreover, their house was so close to the runways of path of glide, that, as the spokesman for

Reasons for Granting the Writ.

the members of the Airlines Pilot Association admitted, 'If we had engine failure we would have no course but to plow into your house.'. Moreover, the flights were endangered by Plaintiff's trees and vice versa. The Viewers found, inter alia, that at the Griggs' property the surface of the approach area is only 11.86 feet above Plaintiff's residence."

In one of the companion cases a substantial portion of the plaintiff's house as well as his trees projected into the approach area or path of glide.

The County of Allegheny, under the provisions of the Airport Zoning Act of April 17, 1945, P. L. 237, 2 P. S. 1653, had the power to condemn air avigation easements and other estates and property for the purpose of providing approach protection for aircraft and the County was obligated by its agreements with the United States to provide such protection.

In speaking of the County of Allegheny, Mr. Justice Bell said in the dissenting opinion at page 423:

"It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family."

and further at page 429:

"... the County must provide, . . . in cases of airports, air approaches, easements and air rights so that it will be safe for its users."

The Pennsylvania decision encourages municipalities to avoid taking land or easements beyond the perimeter of the airport regardless of the hazards to pilots, the traveling public and property owners.

Reasons for Granting the Writ.

IV. The case is of extreme importance not only to the Petitioner and the plaintiffs in the companion cases but to all parties in Pennsylvania and elsewhere similarly situated, as the Pennsylvania decision deprives them of their rights under both State and Federal constitutions.

It is unnecessary we think to further discuss this reason except to state that the properties of the companion cases are situate near the East-West runway as well as the Northeast-Southwest runway; some are more valuable than Petitioner's property; and on one of them the residence substantially projects into the glide angle. In Petitioner's case, the majority of the Court dismissed as moot, his appeal that the Viewers, in fixing the award rejected the undisputed testimony of the expert of whom the lower court said (R. 262a)

"The Viewers heard . . . plaintiff's expert. . . . individually cognizant of his excellent reputation as a citizen and exceptional qualifications. His opinion was neither impeached nor contradicted."

The View of the Viewers was made January 26, 1959.

V. The Pennsylvania decision should be reversed to affirm that the established principle that municipal improvements cannot be made in disregard of the constitutional rights of private property owners is applicable as well to municipally owned airports.

No one can read the facts in the opinions in the litigation without reaching the conclusion that the County of Allegheny, having operated the old airport and laid out the new one, with full knowledge of the

Reasons for Granting the Writ.

facts, determined to ride roughshod over the constitutional rights of the airport neighbors.

For many months after the opening of the Airport the County and the Airlines refused to do anything about the situation and the Petitioner and others, knowing nothing of the aviation matters since developed such as approach areas, gradients, surveys, glide angles, etc., but suffering unjustly from the effects imposed upon them and their properties, filed companion suits in Equity stating that the flights were either a trespass or there was a taking of their properties and asking for compensation or injunction. The County, instead of facing the matter, asserted through the Pennsylvania Courts the very contention overruled in the Causby case resulting in the plethora of litigation reported under the caption Gardner et al. tabulated in the Appendix. This foisted the situation upon the Pennsylvania Courts recounted in the opinions. These Courts did not grapple with the heart of the matter and the effect of the whole litigation is a denial of due process in itself.

The Equity litigation resulted in only one thing of any substance. Eventually the County and the Airlines were forced to admit in their pleadings that the flights over Petitioner's property were below 500 feet, which admissions made possible the commencement of the proceedings in condemnation.

In the proceeding before the Viewers, the County's position was that the entire burden was upon the Petitioner (R. 23a) (R. 129a) and when called upon refused to produce its evidence of altitudes of flight and studies of sound, knowing full well it had none. The County did not believe Petitioner could prove his case.

Reasons for Granting the Writ.

The point of the whole thing is that no municipality should knowingly be permitted to invade the constitutional rights of property owners and force upon them the necessity to obtain the technical understanding of aviation complexities, altitudes of flights, and the proof of all the other matters necessary to make out a case. The municipality, as part of planning the airport, should be required to make the necessary studies. The City of Philadelphia acquired necessary aviation easements. Studies in sound were made which led to the abandonment of the proposed site for the Detroit Airport.

Improper planning of public improvement should not require either that citizens must resort to injunction to protect their constitutional rights. Such procedure throws them unfairly into conflict with the municipality, air transportation, interstate commerce and the public.

We reiterate that the majority of the Supreme Court of Pennsylvania made up its mind it would absolve the County and then support that conclusion with the specious reason which deprived the Petitioner and the others of their constitutional rights and left them with no remedy whatsoever.

*Conclusion.***CONCLUSION**

The decision below is in conflict with the Constitution of the United States and the Constitution of Pennsylvania and, further, in conflict with the decision of your Honorable Court in the case of United States v. Causby, The Supreme Court of Washington in *Ackerman v. Port of Seattle*, and presents a question of national importance. Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

*Appendix A—Opinion.***APPENDIX A****GRIGGS v. ALLEGHENY COUNTY****402 Pa. 411**

Before JONES, C. J., BELL, MUSMANNO, COHEN,
BOK and EAGEN, JJ.

Appeals, Nos. 155 and 158, March T., 1960, from orders of Court of Common Pleas of Allegheny County, July T., 1958, No. 2384, in case of Thomas N. Griggs v. County of Allegheny. Order in appeal No. 155 reversed with directions; appeal No. 158 dismissed; reargument refused February 15, 1961.

Proceedings on exceptions to report of board of viewers awarding damages.

Opinion filed dismissing county's exceptions and orders entered, opinion by SOFFEL, J. Supplemental opinion filed dismissing plaintiff's exceptions and order entered, opinion per curiam. Plaintiff and county, respectively, appealed.

Opinion

By MR. CHIEF JUSTICE JONES, January 16, 1961:

These appeals grow out of a viewers' proceeding instituted by the plaintiff as owner of land neighboring the Greater Pittsburgh Airport to recover damages from the County of Allegheny, the owner and operator of the airport, for an alleged appropriation of the plaintiff's land because of a substantial interference with the use and enjoyment of it caused by flights of aircraft at low altitudes, through the air space above the land, when taking off or landing at the airport.

Appendix A—Opinion.

The Greater Pittsburgh Airport was opened for commercial air travel on June 1, 1952. At that time, Thomas N. Griggs, the plaintiff, was the owner of a nearby tract of land containing 19.161 acres improved with a house, two cottages, a four-car garage with living apartment overhead, and certain outbuildings. Part of the Griggs property lay under an "approach area" for the airport's northeast-southwest runway.

On May 29, 1958, Griggs petitioned the Court of Common Pleas of Allegheny County for the appointment of viewers to assess the damages caused by an alleged taking of his land by the County of Allegheny on June 1, 1952. The petitioner averred that, since the opening of the airport for commercial use, aircraft of several air lines, upon taking off and landing at the airport, have frequently and continuously flown through the air space above his land at an elevation of less than 500 feet; that as the result of such flights, "the use and enjoyment of [his] property have been interfered with by reason of the possible danger of the low flights, the noise and vibrations which they cause, their lights pointing at the premises at night time and interference with sleep and rest"; and that the property has been thereby "greatly damaged and depreciated in value."

The Court appointed a board of view which sat for the purpose of its appointment, heard testimony offered by the claimant, and awarded him damages in the sum of \$12,690. Griggs filed exceptions to the viewers' report alleging that the viewers had unlawfully disregarded the expert testimony adduced by him as to the damages to his property which was the only testimony

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offered before the viewers on that issue. He also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard de novo. The county, contending that it was not liable for any damage allegedly suffered by the claimant, offered no testimony before the board of viewers on the issue of property value. The county filed exceptions to the viewers' award to Griggs setting forth therein that, based upon the viewers' findings of fact, there was no taking of Griggs' property by the County. The court below dismissed all exceptions of both parties from which action each of the parties took an appeal to this court pursuant to Section 2623 of the Second Class County Code of July 28, 1953, P. L. 723, 16 PS § 5623.

It is clear that a property owner may petition the court for the appointment of viewers to assess and award damages against an entity clothed with the power of eminent domain where such entity effects a "taking" of the petitioner's property whether or not the appropriator has followed the statutorily provided condemnation procedure. *Rosenblatt v. Pennsylvania Turnpike Commission*, 398 Pa. 111, 126-127, 157 A. 2d 182; *Philadelphia Parkway*, 250 Pa. 257, 264-265, 95 Atl. 429; *Barron's Use v. United Railway Co.*, 93 Pa. Superior Ct. 555, 557-558. A "taking" occurs when the entity clothed with the power of eminent domain substantially deprives an owner of the beneficial use and enjoyment of his property. *Miller v. Beaver Falls*, 368 Pa. 189, 196-197, 82 A. 2d 34; *Creasy v. Stevens*, 160 F. Supp. 404, 410-412.

Paragraph 12 of Griggs' petition for the appointment of viewers admits that the county has not con-

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demned his land by way of the statutorily authorized procedure.¹

What the claimant attempted to show at the hearing before the viewers was that the county had substantially deprived him of the beneficial use and enjoyment of his property. Assuming, for the present purposes, that he has shown a substantial deprivation of the beneficial use and enjoyment of his property, we shall proceed at once to a consideration of the basic question raised by the county's appeal as to whether such deprivation was, as a matter of law, caused by the County of Allegheny.

The county, relying on findings of fact by the viewers that no flights of aircraft were shown to be in violation of any regulation of the Civil Aeronautics Administration and that no flights were shown to be lower than necessary for a safe landing or take-off, contends that all of the complained of flights were through air space which the United States Congress placed within the public domain and that, therefore, any taking of Griggs' property was by the federal government and not by the County of Allegheny.

Section 10 of the Air Commerce Act of May 20, 1926, 44 Stat. 568, as amended, 49 U.S.C.A., §180, provides as follows: "As used in this Act, the term "navigable airspace, means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject

1. Section 14 of the Airport Zoning Act of April 17, 1945, P. L. 237, 2 PS §1563, confers upon political subdivisions the power to condemn air aviation easements and other estates in property for the purpose of providing protection for aircraft.

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to a public right of freedom of interstate and foreign air navigation in conformity with the requirement of said sections."

Section 3 of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 973, 49 U.S.C.A., § 403, states that "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the *navigable air space* of the United States." (Emphasis supplied)

Section 1 (24) of the Act, 49 U.S.C.A., §401 (24), defines "navigable air space" as follows: "'Navigable air space' means air space above the minimum altitudes of flight prescribed by regulations issued under this Act.

Pursuant to authority granted by the Civil Aeronautics Act of 1938, the Civil Aeronautics Board issued Civil Air Regulations (14 C.F.R., Parts 1-190). Among these Regulations, Section 60.17, Part 60 (Air Traffic Rules), which establishes minimum safe altitudes of flight at 1000 feet over congested areas and 500 feet over other than congested areas, is prefaced with the following: "Except when necessary for taking off or landing, no person shall operate an aircraft below the following altitudes." The County of Allegheny contends that this exception means that minimum safe altitudes of flight for take-offs and landings have been established at the heights necessary for these purposes.² The county concludes, therefore, that the "navigable air space" which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.

2. This is now the position of the Civil Aeronautics Board. Civil Air Regulations, Interpretation 1, 19 F.R. 4602, July 27, 1954.

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While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States v. Causby*, 328 U. S. 256 (1946). The decision in that case upheld the claimant's right to damages from the United States for a taking of certain of his property located near an airport because of a substantial interference with his use and enjoyment of it by low flights of U. S. military planes, when taking off from or landing at the airport. In answer to an argument similar to that which the County of Allegheny makes here, the Supreme Court said (at pp. 263-264), "The fact that the path of glide taken by the planes was approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority.' 49 U.S.C.A., sec. 180. If that agency prescribed 83 feet [the height at which the planes passed over Causby's land] as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done. The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace. The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, sections 61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain Id. Pt. 60, sections 60.350-60.3505, Fed. Reg. Cum. Supp., supra.

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Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight."³

Thus, the Supreme Court has held that the navigable air space which Congress placed in the public domain does not include the path of glide for an airplane's take-off or landing. As we are, of course, bound by the Supreme Court's interpretation of the federal statutes involved, we are, perforce, required to reject the County's contention that navigable air space, as employed by Congress, includes the area necessary for an airplane's take-off or landing in safety.⁴

3. The Supreme Court of Washington recently rejected the identical argument, based upon Section 60.17, Part 60, of the Civil Air Regulations, that the County of Allegheny is now pressing upon us, quoting this paragraph from *United States v. Causby, supra. Ackerman v. Port of Seattle*, 348 P. 2d 634 (1960).

4. Congress moved to counteract the effect of the decision in *United States v. Causby*, by enacting the Federal Aviation Act of August 23, 1958, Pub. L. 85-726, 72 Stat. 731, 49 U.S.C.A., §1301 et seq., Section 1401(b) whereof repealed the Civil Aeronautics Act of 1938. Section 104 of the later Act, 49 U.S.C.A., §1304, provides

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But, even though the complained of flights were not through air space which was part of the public domain, the record does not show that the County of Allegheny was the efficient legal cause of any damage resulting from the flights. Griggs testified at the hearing before the viewers that the airplanes of several commercial air lines flew over his land at low altitudes. But, he offered no proof that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that "There is no evidence of any control exercised over any aircraft by the County of Allegheny." That finding, supported as it is by the record precludes the claimant from recovering against the County in this proceeding.

In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in compliance with rules and regulations of the Civil Aeronautics Authority, drafted a "Master Plan," showing an "approach area" over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of aviation over Griggs' property, nor was any evidence offered to show that such action deprived

that, "There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." And, Section 101 (24), 49 U.S.C.A., §1301 (24), declares that (as used in the Act), "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (Emphasis supplied.)

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Griggs of any use and enjoyment of his property, substantially or otherwise.

It is true that in *United States v. Causby*, supra, the United States was held to have effected a taking of certain property neighboring an airport. But there the United States owned and its agents operated the aircraft which caused the deprivation of the owner's use and enjoyment of the neighboring property. The airport itself was owned by the Greensboro-High Point Municipal Authority, which had leased to the United States Government the right to use the field "concurrently, jointly, and in common" with other users. The Supreme Court in the *Causby* opinion did not indicate who actually maintained and operated the airport, evidently considering this point irrelevant.

For Griggs to make use of *United States v. Causby*, supra, as a precedent, it would seem that he should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land. Such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P. L. 1001, 2 P.S. §1469, which provides, in part, as follows: "The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Commercial air lines are not, of course, clothed with the power of eminent domain and cannot, therefore, be

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proceeded against by a complaining land owner through a viewers' proceeding for the assessment of damages for a taking of his property.

In view of our conclusion herein that there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, the question raised by the plaintiff's appeal has become moot.

The order dismissing the County's exceptions to the viewers' report on appeal at No. 155 is reversed with directions that the viewers' report be vacated and set aside.

Plaintiff's appeal at No. 158 is dismissed.

DISSENTING OPINION BY MR. JUSTICE BELL:

In *Gardner v. Allegheny County*, 328 Pa. 88, 114 A. 2d 491, the Court analyzed and reviewed at length a number of the problems arising out of flight of aircraft over privately owned lands and held inter alia (page 116): first, "It is clear as crystal under the authority of *United States v. Causby* [328 U. S. 256] that flights over private land which are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land amount to a 'taking.'" And secondly, that a Court of Equity has no power or jurisdiction to assess damages for a taking, but damages for property taken, injured or destroyed lies in proceedings before the Board of View. In that decision we did not decide who

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were proper defendants. The plaintiff, relying on the *Gardner* case, brought proceedings before the Board of View and proved that the flights were so low and so frequent as to be a direct and immediate interference with the enjoyment and use of his land and hence amounted to a taking for which he was entitled to recover damages in eminent domain proceedings before the Board of View.

The Viewers found, inter alia, that "The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 12:01 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time.

"The damages allowed by the Viewers have been measured by the usual procedure of deducting the after value from the value of the property as a whole immediately before and unaffected by the public improvement, to which has been added 6% per annum interest as detention money from the date of opening the Airport. We have found that the highest and best use of the property was as a country estate. We determine the "after" diminished value of the property as being directly and immediately caused by frequent low flying to and from the Airport, inevitably producing noise, vibration, fear of disaster, anxiety and general interference with the peaceful and quiet enjoyment of the property by the owner, resulting in damages to the extent of \$12,690."

Defendant appealed because it believed it had no liability. Plaintiff appealed because he believed the

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award of damages was inadequate. The two basic questions involved are (1) whether the County of Allegheny had any liability for the damages which plaintiff unquestionably suffered and (2) if so, what was the date of the taking and subsidiarily were the damages inadequate?

The County of Allegheny acquired the Greater Pittsburgh Airport and all the land included in and/or surrounding the airport, as well as air rights and/or easements by eminent domain, pursuant to the Act of May 2, 1929, P. L. 1278. The Airport was opened for commercial flights on July 1, 1952. The County not only owned the Airport, but it also constructed the buildings thereon and the landing fields and the runways to the airport. It also owed a duty to repair and maintain them. It leased the land and facilities for commercial flights, to various airlines. Furthermore, the County knew that the approach and the path of glide or the descent path and the airlines themselves were in minute detail regulated, prescribed and directed how, when and where to fly, how, when and where to approach, and land and take off, by independent Governmental Agencies known as the Federal Aviation Agency and the Civil Aeronautics Board.

Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would fre-

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quently get awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted "If we had engine failure we would have no course but to plow into your house." Moreover, the flights were endangered by plaintiff's trees and vice versa. The Viewers found, *inter alia*, that at the Griggs' property the surface of the approach area is only 11.86 feet above plaintiff's residence. There isn't the remotest doubt and the Viewers so found that these low flights produced exceptional noise, disturbance and vibrations, placed the plaintiff and the members of his household in fear and jeopardy of their safety or lives and substantially, materially and realistically interfered with the peaceful, quiet and legally justifiable enjoyment of their property.

There are four possible solutions: (1) No recovery—*damnum absque injuria*, like cases where property owners along a railroad track cannot recover for the noise and smoke which inconveniences and upsets them. (2) The United States is liable because (a) it furnished funds to the County of Allegheny to help pay for the acquisition and construction of this airport, and (b) it approved by a contract the County's acquisition of and its master plan for this airport, and (c) it regulates and minutely orders and directs through the Civil Aeronautics Board the take-offs and landings and path of glide of all planes entering and leaving the airport. (3) The airlines which fly some or many of the flights which injure plaintiff's

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property and interfere with or jeopardize its existence and the safety of plaintiff and others lawfully thereon. (4) The County of Allegheny which acquired by eminent domain the ownership of the property and constructed the airport, the buildings, the approaches and runways, all of which it must maintain at its expense, leases and (to some extent) operates the airport. It clearly failed to acquire by eminent domain or otherwise sufficient land and air rights to protect plaintiff's property and his safety and life, and the safety and lives of his family.

It would be not only unfair but also unconstitutional to deny plaintiffs any recovery for the taking of either their land or an easement thereon. Article XVI, § 8 of the Constitution of Pennsylvania provides: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation *for property taken, injured** or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction." The Constitution of the United States, Article V, similarly provides: "... nor shall private property be taken for public use, without just compensation."

We agree that the evidence clearly shows that there was a "taking" of plaintiff's superterranean easement, and I am convinced that the evidence demonstrates that there was a "taking" of plaintiff's entire property.

In *Miller v. Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, the Court said (pages 196-197): "... The law as to what

* Italics throughout, ours.

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constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that *when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property*, and his property may be taken, in the constitutional sense, though his title and possession remain undisturbed . . . "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*" [Cheves v. Whitehead, 1 F. Supp. 321]: 11 McQuillin, Municipal Corporations (3rd ed.) §32.26, p. 312. As the Court of Appeals of New York, in Foster v. Scott, 136 N.Y. 577, 32 N.E. 976, . . . so aptly said (page 584): ' . . . All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession . . . '

" . . . [As] Mr. Justice, later Chief Justice SCHAFER, in his opinion, after calling attention to the provisions of the Constitution of Pennsylvania, said (page 490): 'The governing principle is accurately stated in 20 Corpus Juris, 566, "There need not be an actual, physical taking, but any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner may constitute a taking

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for which compensation must be made to the owner of the property" " "

Airlines and airports are of modern origin. The problems which have arisen in connection with airports and aircraft and air travel were unknown to the Common Law and in reality arose for the first time in the 1920's, or thereafter. Until the opening of the air age the owner of real property owned from the surface (or below) to the sky—*cujus est solum ejus est usque ad coelum*. That principle has been very substantially modified. It is now held that the owner of land owns from the surface (or lower regions to the upper reaches and regions of the air to whatever heights may be needed for use and enjoyment of his property. In considering the problems created by the air age, we are faced with the task of reconciling traditional common law concepts with the realities of modern day life. In our desire for progress we must not overlook or extinguish the inherent and inalienable constitutionally guaranteed rights of private property which is one of the bedrocks of our Federal and State Governments, and indeed one of the two great hallmarks of western civilization. We must not allow, in the appealing name of progress or general welfare, a property owner to be deprived by the Federal, State or County Government, or by anyone, of his property or any rights accruing therein and therefrom.

As Mr. Justice HOLMES said in his opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-416, 43 S. Ct. 158 (in which he declared the Kohler Act of May 27, 1921, P. L. 1198 unconstitutional): "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall

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not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . ."

The contention that the County is exempt from liability (a) because the air space is a few feet above plaintiff's property and within the public domain, and (b) whatever injury or damage was caused was caused by the airlines; and (c) because the appropriate Federal Agency authorized the flights, is without merit. The United States Supreme Court in *United States v. Causby*, 328 U.S. 256, has rejected these contentions. There, the Court, speaking through Mr. Justice DOUGLAS, pertinently said (pages 263-265): "The fact that the path of glide taken by the planes was that approved by the Civil Aeronautics Authority does not change the result. The navigable airspace which Congress has placed in the public domain is 'airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Au-

thority.' 49 U.S.C., §180. If that agency prescribed 83 feet as the minimum safe altitude, then we could have presented the question of the validity of the regulation. But nothing of the sort has been done. *The path of glide governs the method of operating—of landing or taking off. The altitude required for that operation is not the minimum safe altitude of flight which is the downward reach of the navigable airspace.* The minimum prescribed by the Authority is 500 feet during the day and 1,000 feet at night for air carriers (Civil Air Regulations, Pt. 61, §§61.7400, 61.7401, Code Fed. Reg. Cum. Supp., Tit. 14, ch. 1), and from 300 feet to 1,000 feet for other aircraft, depending on the type of plane and the character of the terrain Id., Pt. 60, §§60.350-60.3505, Fed. Reg. Cum. Supp., supra. Hence, the flights in question were not within the navigable airspace which Congress placed within the public domain. If any airspace needed for landing or taking off were included, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking. Thus, it is apparent that the path of glide is not the minimum safe altitude of flight within the meaning of the statute. The Civil Aeronautics Authority has, of course, the power to prescribe air traffic rules. But Congress has defined navigable airspace only in terms of one of them—the minimum safe altitudes of flight.

"We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The prin-

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ciple is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See *Hinman v. Pacific Air Transport*, 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, *the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it.* We would not doubt that, *if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.* The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between building for the purpose of light and air is used. *The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.*"*

* Under facts on all fours with the facts in the instant case, our sister states have held that an injunction will issue against a city or county which owns or operates an airport, on the ground that flights which jeopardize the health, safety or property of a landowner

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Moreover, an airport is like a bridge; the County must provide, furnish and maintain suitable approaches and the owner of the airport or bridge must take sufficient land, and in cases of airports, air approaches, easements and air rights so that it will be safe for its users. Cf. *Penn Township v. Perry County*, 78 Pa. 458; *Knoll v. Harborcreek Township*, 86 Pa. Superior Ct. 423; *Beaver Borough v. Beaver Valley Railroad Company*, 217 Pa. 280, 66 A. 520; *Miller v. Beaver Falls*, supra, *United States v. Causby*, 328 U.S. 256; *Ackerman v. Port of Seattle*, 329 P. 2d 210, 349 P. 2d 664.

Even if it be conceded arguendo that the air space in question, namely, 12 feet above plaintiff's home and buildings, is a part of the public domain, it could not, under the Constitution and under *United States v. Causby*, be taken for public use without proper compensation. Not only is it unsafe for the planes, but it seriously jeopardizes the health and safety of plaintiff and his family and guests and constitutes not only an unreasonable interference with his property, but also amounts to a nuisance.

The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically impossible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They fol-

amount to a nuisance: *City of Phoenix v. Harlan*, 75 Ariz. 290, 255 P. 2d 609; *Brooks v. Patterson*, 159 Fla. 263, 31 So. 2d 472; *Delta Air Corporation v. Kersey*, 193 Ga. 862, 20 S.E. 2d 245.

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low implicitly the law, the regulations and the orders of the Government of the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their take-offs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month or year it occurred. Moreover, if he or a member of his family or employee were sitting and watching outside his home, how could he or they know, even with an interspace telephone, exactly what was happening at a particular moment to the owner's wife or those inside his home, and exactly what was happening at that particular moment to the wall, ceilings, plaster and interior of his house, and which Airline caused what?

There is likewise no merit in the County's last two contentions. The fact that the Civil Aeronautics Board or other Federal Authority approved the flights in question is irrelevant and immaterial in the present case, although it may be relevant in cases where the facts are substantially different. Although we believe that the airspace in question, i.e., 12 feet above plaintiff's home, is not a part of the public domain—Federal, State, local or otherwise—even if it were, its appropriation and use for planes flying into and out of this airport at that height would amount to a "taking" of plaintiff's property. *United States v. Causby* and cases *supra*.

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In *Ackerman v. Port of Seattle*, *supra*, the Supreme Court of Washington decided that the Airport owned by the Port of Seattle was liable in damages for a "taking" which resulted from low flights into the Airport in accordance with Federally prescribed regulations or orders. Washington has the same Constitutional provision as does the Commonwealth of Pennsylvania in regard to compensation for private property taken, injured or destroyed. That Court held specifically that flights in the normal approach area which caused fear, anxiety and apprehension constituted an unreasonable interference with plaintiff's property and amounted to a "taking" by the Port of Seattle. In the course of its opinions that Court aptly said (329 P. 2d, page 216, 221 and 348 P. 2d, page 671): "... if the state first declared private lands to be public domain and then built a road thereon, it is quite aparent that there would be a violation of Art. I, §16, amendment 9, of the Washington constitution. We believe this is as true with space in the air as it is with the surface of land. The government simply cannot arbitrarily declare that all of the airspace over a person's land is public domain and then, cavalierly, claim absolute immunity against property owners' claims for any and all possible damages. ...

"... under this constitutional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate. ...

"This interpretation of Congress' declaration as to what constitutes public domain in the airspace is sup-

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ported by the Federal government's policy of condemning and compensating for air easements over property adjoining Federal air bases. See *United States v. 48.10 Acres of Land, etc.*, D.C. S.D. N.Y. 1956, 144 F. Supp. 567* . . . Clearly, *an adequate approach way* is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed, if the private airspace of adjacent landowners, is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip."

Finally, the fact that the Civil Aeronautics Board approved the plan for the airport will not relieve the County which is the owner of the airport and the adjoining land. If there could be any doubt as to the County's liability it would unquestionably be removed by (1) well settled principles of law and (2) by *United States v. Causby, supra*, and (3) by the agreement entered into between the United States and the County by which the County obtained enormous federal aid for the construction of this airport. In that agreement the County specifically undertook, *inter alia*, the following: "(i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, take-off or maneuver."

* The City of Philadelphia similarly acquires by purchase or otherwise air rights over properties adjacent to its International Airport in order to comply with the Constitution of Pennsylvania and the Constitution of the United States.

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ering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a Zoning Ordinance and regulations, or by the acquisition of easements or other interests in land or airspace, or by both such methods."

The duty and legal obligation to acquire land, buildings, easements and other interests in land and in air space which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the Airport, was clearly and unquestionably *by the terms of this contract* that of the County of Allegheny. It follows that the County is liable to the plaintiff (1) under and by virtue of the well and long settled Common Law principle of *sic utere tuo ut alienum non laedas*, and (2) under the *United States v. Causby* case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America.*

The viewers determined the taking of plaintiff's property as of the opening of the Airport June 1, 1952, pursuant to a prior County ordinance. The great difficulty which arises because of the complexity of the facts in this case is instantly apparent, and it is virtually a practical impossibility to fix any other date for the taking. We cannot say that the date which the Viewers found constituted a taking was erroneous. Moreover, in view of the conflicting testimony and the inherent difficulty of appraising and fixing the damage which

* Per the Administrator of Civil Aeronautics.

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plaintiffs suffered, we cannot say that the Viewers erred in their verdict.

I would affirm the Orders of the lower Court.

Mr. Justice Eagen joins in this dissenting opinion.

Appendix A—Opinion.**APPENDIX A**

**GARDNER v. ALLEGHENY COUNTY, Appellant,
393 Pa. 120 (1958)**

Appeals, Nos. 72, 73, 74, 75, and 76, March T., 1958, from order of Court of Common Pleas of Allegheny County, Oct. T., 1953, Nos. 1289, 1640, 1288, 1707, and 1706, in case of K. G. Gardner et al. v. County of Allegheny et al. Order reversed.

Equity.

Order entered dismissing preliminary objections of County of Allegheny, opinion by WEISS, J. County appealed.

Opinion

MR. JUSTICE BELL, June 3, 1958:

The County of Allegheny appealed from an order of the Court of Common Pleas of Allegheny County which dismissed the preliminary objections filed by the County to certain *new matter* in the Answer of the defendant Airlines.* A complaint in equity had been filed by the respective owners of five properties which are situate adjacent to the Greater Pittsburgh Airport in Moon and Findlay Townships, Allegheny County. In the court below, in this Court, and in all prior proceedings before this Court, the five actions were consolidated for argument and trial.

The complaint in equity of the respective property owners sought an injunction against the county and against all of the airline defendants to restrain alleg-

* The appeal was taken under the Act of March 5, 1925, P.L. 23, §1, 12 PS §672.

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edly dangerous and illegal flights of aircraft over their respective properties. Plaintiffs averred that these flights, which number 8 every ten to fifteen minutes, and which endangered their lives and their homes, were unlawful trespasses. The owners asked as an alternative relief, that the court (a) find that the acts of the defendants constituted a "taking" and (b) award to each plaintiff the fair market value of his property. The defendants filed preliminary objections to each of these complaints; these objections were overruled by the Court below. Upon appeal, this Court decided in *Gardner v. Allegheny County*, 382 Pa. 88, 114 A. 2d 491, that on the pleadings, as they then existed, the Court below (1) was correct in overruling the preliminary objections of the defendants to that part of the complaint which sought an injunction, (2) but was in error in overruling the County's objection to plaintiffs' claim for a "taking" of their respective properties, and (3) directed the lower Court to enter a modified Decree consistent with this Court's Opinion.

The Court below thereupon entered an Order on September 30, 1955, which was subsequently amended by its Order dated March 15, 1956, the effect of which was to strike from the plaintiffs' complaint all claims for damages for a "taking", leaving only a claim for injunctive relief and for damages for trespass. The lower Court wisely permitted the defendants to file Answers including new matter.

The airlines in paragraph 19a of their Answers averred the following new matter:

"19a. The County of Allegheny, one of the defendants, has constructed and maintains the Greater Pitts-

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burgh Airport in Moon Township, Allegheny County, Pennsylvania, as a public improvement, pursuant to statutory authority to provide airport and air transport facilities for the use of the public. To enable the public to have facilities for air transport of passengers and cargo, which facilities are essential for the functioning of the airport, it is necessary that airplanes *enter and leave** the airport by passing *through the air space above the plaintiffs' property below 500 feet*. Allegheny County has entered into a lease with each of the airline defendants granting to them for certain considerations the right to ingress and egress to and from the said airport.

"As a direct and necessary consequence of the construction and operation of the airport by the said County, the said County, *under its right of eminent domain*, has appropriated for public use, *aviation easements* for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. The airline defendants aver that their planes pass through the air space over the plaintiffs' property only to the extent necessary to enter and leave the airport and in the exercise of their right to use the aviation easements which the County has appropriated. Wherefore, the airline defendants deny the right of the plaintiffs to enjoin their use of the aviation easements appropriated for public use by the County of Allegheny."

Defendants further averred that "all of the flights of aircraft in and out of the Greater Pittsburgh Airport have been in accordance with the regulations issued by

* Italics throughout ours.

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the Civil Aeronautics Administration [Board] . . . and are never lower than necessary for safe landing and takeoff."

The County of Allegheny thereupon filed preliminary objections to paragraph 19a of the new matter in the Airlines' Answers on the ground that the allegations presented a question which this Court, in our prior decision, had decided was not within the jurisdiction of a Court of Equity.

This appeal, which is based upon new facts, raises new questions which were not before this Court, as well as questions which were not definitely decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. The lower Court interpreted our prior decision as prohibiting a Court of Equity from making an award of damages for a "taking", but did not prohibit the Court of Equity from determining that there had been a "taking", and did not prohibit a Court of Equity from awarding damages for trespasses.* The County of Allegheny, on the other hand, contends that a Court of Equity—for technical, legal and practical reasons—should not be entitled to determine the question of whether there had been a "taking", and then leave to a board of viewers merely the question of assessing the damages.

Novel, intricate and difficult questions are raised by this appeal. Each party has presented technical, as well as practical, reasons why their position should

* It is obvious that a Court of Equity could award damages for trespasses only if, and after it found that plaintiffs were entitled to equitable relief, because of the danger to the lives or properties of plaintiffs.

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be sustained. We believe it would aid a solution of these problems if we pointed out what was and what was not decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. It must be recalled that this case, as well as the prior case, arose upon preliminary objections to pleadings, which of course admitted all averments of fact made in the complaints in the prior cases and in the Answer in the present case: *DeJoseph v. Zambelli*, 392 Pa. 24, 139 A. 2d 644; *Eways v. Reading Parking Authority*, 385 Pa. 592, 124 A. 2d 92; *Gardner v. Allegheny County*, 382 Pa., supra.

In our prior decision in 382 Pa., this Court held, inter alia: (1) A Court of Equity has jurisdiction to enjoin repeated trespasses in the air which endanger the lives and homes of complainants, as well as trespasses on the land of a property owner, and likewise to enjoin a nuisance. (2) A Court of Equity has jurisdiction to enjoin continuing flights of aircraft over a landowner's property at heights which are below the minimum safe altitudes of flight. Whether a Court of Equity has jurisdiction to enjoin aircraft flights which are within the air space necessary for safe takeoffs or landings if such flights imminently endanger a property owner's life or property, was not decided. (3) Flights of aircraft over privately owned land which are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the land amount to a "taking" of the land or, depending on the facts, may amount to a trespass or a nuisance. Even though only an "easement" of flight was taken, that easement, if permanent and not merely temporary, would normally be the equivalent of a fee simple interest. (4) The Act of May 2, 1929, P. L. 1278, which

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was reenacted in the Second Class County Code, specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding when compensation cannot be agreed upon. (5) A Court of Equity has no jurisdiction to assess damages for a "taking" of land.*

On the question of eminent domain, which was so vigorously argued in the present appeal, this Court said in 382 Pa.:

"Nevertheless, a Court of Equity has no power or jurisdiction to assess damages for a 'taking'. The condemnation of property for airdromes and landing fields is authorized by the Act of May 2, 1929, P. L. 1278, Art. V, §496, since reenacted in the Second Class County Code, 16 PS 2151-2401 et seq. Section 2151-2403 provides: 'The proceedings for the condemnation of lands under the provisions of this article [Aeronautics] and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided [by law for the condemnation of land.]'

"Art. VII, §518, of the Act of May 2, 1929, P. L. 1278, now reenacted in the Second Class County Code, 16 PS 2151-2608(a), sets forth the provisions for the condemnation of land above referred to. The section provides: 'In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed

* An opinion for the Court, a concurring opinion, a separate concurring opinion, and an opinion concurring in part and dissenting in part were filed in this case, which is exceptionally unusual in this Court and was probably necessitated by the somewhat indefinite statement of facts and the novel questions of law presented.

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by the county fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition . . . to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, . . .

“The said viewers . . . having viewed the premises . . . shall hear all parties interested and their witnesses, and, . . . shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, . . .”: Article VII, §523.

“That Act specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding, when compensation cannot be agreed upon. Nowhere in the Act is there any provision for a Court in Equity to fix and determine the value of plaintiffs’ property. This Court, in *Hastings Appeal*, 374 Pa. 120, 97 A. 2d 11, said (page 125): ‘A board of view is not a common law remedy; it exists only where it has been provided for by statute: see *Locust Street Subway Case*, *supra* [319 Pa.] at p. 165. In the situations for which it has been provided, it is the only available remedy: *Power v. Borough of Ridgway*, 149 Pa. 317, 318, 24 A. 307; and *McKee v. City of Pittsburgh*, 7 Pa. Superior Ct. 397, 400; . . .’ . . .

“While there is a well established general principle that once equitable jurisdiction has attached, equity can round out the whole circle of controversy and thus do complete justice between the parties: See: *Wortex Mills, Inc. v. Textile Workers Union of America*, 380 Pa. 3, 109 A. 2d 815, and cases cited therein; nevertheless, this principle cannot be extended and gives no

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power or jurisdiction to a Court of equity to grant relief in matters in which a specific and adequate remedy or different jurisdiction is provided by statute: *United Drug Co. v. Kovacs*, 279 Pa. 132, 123 A. 654; *Century Distilling Co. v. Continental Distilling Co.*, 106 F. 2d 486.

"We therefore hold that a Court of Equity has no power or jurisdiction to determine or assess damages for a 'taking' of plaintiffs' property and is consequently without jurisdiction to grant that phase of the alternative relief demanded by the plaintiffs."

While the members of this Court differed on several questions there involved, all of the Court were unanimously of the opinion that a Court of Equity could not award compensation for a "taking".

It is clear from the present pleadings that plaintiffs have been damaged, and the questions are: Who must pay for this damage, what action or actions can be brought by plaintiffs, and who are proper parties therein? The answer to these questions will depend, in the last analysis, upon the facts developed at the trial of the case. For example, the nature and extent of the trespasses; the amount of interference with plaintiffs' lives or properties; whether frequent and dangerous and unlawful flights will amount to trespasses or by their nature, character and frequency, are so permanent as to amount to a "taking"; and if a "taking", whether it be a "taking" of an easement or a fee simple—all of these questions will, in the last analysis, we repeat, depend upon the facts which are produced at the trial at law.

We are aware of the fact that the airlines have pleaded, and the county has admitted, by its prelimi-

Appendix A—Opinion.

nary objections to the new matter contained in the airlines' answer, that the county, "... under its right of eminent domain, has appropriated for public use, aviation easements for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. . . . Allegheny County has entered into a lease with each of the airline defendants granting to them for certain [valuable] considerations the right of ingress and egress to and from the said airport . . . [and] it is necessary that airplanes enter and leave the airport by passing through the air space above the plaintiffs' property below 500 feet."

Everyone knows that it is necessary for planes in *landings and takeoffs* to pass through the air space below 500 feet. The airlines and the county have admitted for the first time that airplanes pass through the air space above the plaintiffs' properties below 500 feet in takeoffs and landings.

The parties agree that private airlines have no right of eminent domain. The County of Allegheny, pursuant to statutory authority, has appropriated for public use, under its power of eminent domain, aviation easements for the flight of planes and has constructed, operated and leased this airport. Under the present pleadings, the County of Allegheny is liable in eminent domain proceedings for damages to plaintiffs' properties—plaintiffs have the choice to bring an action of trespass, or proceedings for a "taking" against the County of Allegheny for their damages, depending upon the facts provable by plaintiffs.

We decide that the Court of Equity does not have jurisdiction under the pleadings in this case to deter-

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mine that there was a "taking" of plaintiffs' properties, or the amount of damages resulting from a "taking" of the easement, or of the fee of the plaintiffs, as the case may be.

The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed "to determine and assess the damages for the land, property or material taken, injured or destroyed . . ." See also: Article I, §10; Article XVI, §8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the board of viewers be bound by such a decision or could the board make a determination that there was a "taking" of a fee simple instead of an easement, or that there was no "taking" at all? As the present Chief Justice said in *Powell Appeal*, 385 Pa. 467,* 123 A. 2d 650 (pages 471-472): "While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, it is implicit that a jury of view must decide all relevant questions of law or fact before it can completely make an award of damages or assess-

* Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was no specific authority granted to the Court of Quarter Sessions or to the board of view to determine whether there had been a "taking."

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ment of benefits: see *Case of the Germantown and Perkiomen Turnpike Road Company*, 4 Rawle 191. . . . '[The viewers] were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the sessions.' ***

It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the present defendants have been brought and completed, or have been waived under §2632 of the Second Class County Code and finally determined in such a proceeding. This stay of proceedings shall be without prejudice to the right of each party to subsequently file, if desired, answers, replications and other pertinent pleadings.

The Orders of the Court of Common Pleas of Allegheny County dated January 2, 1958, at October Term, 1953, Nos. 1289, 1640, 1288, 1706 and 1707 are hereby reversed, and proceedings are hereby stayed in accordance with this Opinion. Each party shall bear his, its and their respective costs in this appeal.

*** Court of Quarter Sessions.

*Appendix B—Provisions Involved.***APPENDIX B****CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED,***Fifth Amendment—Just Compensation*

* * * nor shall private property be taken for public use, without just compensation. U.S.C. Const. Amdt. 5.

Fourteenth Amendment—Due Process Clause

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U.S.C. Const. Amdt. 14.

Pennsylvania Constitution

"Sec. 8. Property taken, injured or destroyed by private and municipal corporations

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law." Pennsylvania Const. Article 16, Section 8.

Appendix B—Provisions Involved.

State Courts; Appeal; Certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929." 28 U.S.C., Section 1257 (2), (3).

Navigable Airspace

"As used in sections 171, 174-177, and 179-184 of this title, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections. May 20, 1926, c. 344, Section 10, 44 Stat. 574; June 23, 1938, c. 601, Section 1107 (i) (1), (8), 52 Stat. 1028." 49 U.S.C. 180.

Appendix B—Provisions Involved.

General safety powers and duties of Board; delegation of authority to Administrator

"(a) The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

... (7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." ... 49 U.S.C. 551 (a) (7).

Lawfulness of flight

"Flight in aircraft over the lands and waters of this Commonwealth is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another without his consent is unlawful, except in the case of a forced or emergency landing. For damage caused by a forced or emergency landing, the owner, lessee, and operator of the aircraft shall be liable, as provided in section four hundred three. (1933, May 25, P. L. 1001, Art. IV., Section 402.)" 2 Purdon's Stat. Ann., Section 1648.

Damage to persons and property on the ground

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or dam-

Appendix B—Provisions Involved.

age to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.

As used in this section, 'owner' shall include a person having full title to aircraft and operating it through servants, and shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire; but 'owner', as used in this section, shall not include a bona fide bailor or lessor of such aircraft, whether gratuitously or for hire, or a mortgagee, conditional seller, trustee for creditors of such aircraft or other persons having a security title only, nor shall the owner of such aircraft be liable when the pilot thereof is in possession thereof as a result of theft or felonious conversion.

The person in whose name an aircraft is registered with the United States Department of Commerce shall be prima facie the owner of such aircraft within the meaning of this section. (1933, May 25, P. L. 1001, Art. IV., Section 403.)" 2 Purdon's Stat. Ann., Section 1469.

Acquisition of air rights

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act, or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political

Appendix B—Provisions Involved.

subdivision within which the property or nonconforming use is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, such air right avigation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act. In the case of the purchase of any property, or any easement, or estate, or interest therein, or the acquisition of the same by the power of eminent domain, the political subdivision making such purchase or exercising such power shall, in addition to the damages for the taking, injury or destruction of property, also pay the cost of the removal and relocation of any structure or any public utility, which is required to be moved to a new location. 1945, April 17, P. L. 237, Section 14." 2 Purdon's Stat. Ann., Section 1563.

Minimum safe altitudes

"... 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary** for take-off or landing no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the

Appendix B—Provisions Involved.

highest obstacle within a horizontal radius of 2,000 feet from the aircraft . . .

“(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . .” 14 C.F.R. Part 60, Section 60.17.

*Appendix C—Table of Opinions.***APPENDIX C**

Table of Opinions In The Equity Litigation, Being The Companion Cases (all opinions are reported under the caption Gardner et al. v. County of Allegheny, Trans-world Airlines, Inc. et al.)

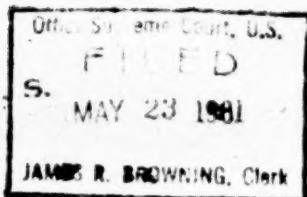
COURT OF COMMON PLEAS, ALLEGHENY COUNTY

<i>Date</i>	<i>Citation</i>
September 30, 1953	unreported
January 5, 1954	unreported
April 23, 1954	unreported
May 13, 1954	unreported
September 30, 1955	unreported
March 15, 1956	unreported

SUPREME COURT OF PENNSYLVANIA

<i>Date</i>	<i>Citation</i>
May 23, 1955	382 Pa. 88
June 3, 1958	393 Pa. 120

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IN THE
Supreme Court of the United States

81
~~81~~ OCTOBER TERM, 1960

THOMAS N. GIGGS

v.

COUNTY OF ALLEGHENY

**RESPONDENT'S REPLY TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
COMMONWEALTH OF PENNSYLVANIA**

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IN THE
Supreme Court of the United States

NO. 910 OCTOBER TERM, 1960

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

**RESPONDENT'S REPLY TO PETITION
FOR WRIT OF CERTIORARI**

I. Certiorari Should Be Denied for Lack of Jurisdiction

The petitioner sued for damages on a claim that the County of Allegheny, without formally exercising its statutory right to condemn property for airport purposes, did, in fact, take petitioner's property for such purpose.

Petitioner received due process throughout. There was a petition and hearing before the Board of Viewers, exceptions taken and heard by the Court of Common Pleas of Allegheny County, and an appeal from the decision of that court to the Supreme Court of Pennsylvania, all pursuant to statutory procedure.

The case involves complicated factual questions concerning regulations of the Federal Government, activities of commercial airlines, and the role of the County, which is that of owner of the airport involved. The only parties involved in this proceeding were the petitioner and the County of Allegheny and the sole question was whether petitioner's property was taken

Respondent's Reply to Petition.

by the County of Allegheny. The decision of the State Supreme Court was that the County of Allegheny did not take petitioner's property under state law.

Your Honorable Court has previously stated that, where a plaintiff had the benefit of a full and fair trial in state courts on the question of a taking under state statute, no due process right under the Federal Constitution is violated: *Marchant v. Pennsylvania Railroad*, 153 U.S. 380 (1894).

In that case also plaintiff obtained an award of damages in the lower court for an alleged taking under state law which award was reversed by the Supreme Court of Pennsylvania on appeal. In sustaining the decision, your Honorable Court made it clear it did not consider that any due process question was involved in the type of situation here present. At page 385 of 153 U.S., it was said:

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having first been made or secured, involves certain questions of fact. . . . But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of the State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitutions of that State,

"But we are urged to sustain and exercise our jurisdiction in this case because it is said that the

Respondent's Reply to Petition.

plaintiff's property was taken 'without due process of law,'

"It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of (p. 386) her property, the proceedings that so resulted were in 'due process of law.'

"The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

Petitioner cannot contend here that he was not afforded due process under provisions of the Federal Constitution and the Constitution of Pennsylvania. The case was thoroughly considered.¹ The Supreme Court

1. In fact, the Pennsylvania Supreme Court by this time was thoroughly familiar with the case since in equity proceedings filed by the plaintiff who sought an injunction to forbid flights from the airport, the case had been before the Supreme Court on a number of occasions. *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491 (1955); 393 Pa. 120, 142 A.2d 187 (1958). Actually, the case had been argued before the Supreme Court on four different occasions although there are only two reported opinions. In the first instance, the case was returned to the Court of Common Pleas for an entry of a proper order and no opinion accompanied this action. Subsequently, on a second appeal after oral arguments and briefs, an opinion was handed down on January 12, 1955. This opinion is not reported in the official reporters because upon a petition for re-argument filed by the County, there was a re-argument in which the court also permitted argument and briefs on behalf of the C.A.B. and C.A.A. which had intervened as amici curiae. (For reference to these matters see page 93 of 382 Pa., page 494 of 114 A.2d).

Respondent's Reply to Petition.

of Pennsylvania did not foreclose petitioner from the possibility of recovery against the County or other parties in other forms of action. The State Court simply decided that under state law, and under the facts of this case, there had been no taking of petitioner's property by the County, and the court stated at page 418 of 402 Pa. and page 126 of 168 A. 2d. ". . . [T]he record does not show that the County of Allegheny was the efficient legal cause of any damage resulting from the flights." For your Honorable Court to attempt to delve into the complicated issues of fact already thoroughly reviewed by the State Court would be to inquire unjustifiably into the State Court proceedings.

Furthermore, the fact that two different state appellate courts have reached different results under their respective statutes, gives this Court no jurisdiction under the Federal Constitution and of course it is obvious that the Fifth Amendment is nowhere in this case.

II. Even if It Is Assumed That This Court Has Jurisdiction, the Case Does Not Merit Review

Moreover, even if it could be considered that there was a Federal Constitutional question involved, it is so intermixed with questions of fact relevant only to this case that it could scarcely be argued that this case presented such a fundamental question of constitutional law that the case should be reviewed by Your Honorable Court.

Actually, what petitioner is really complaining about is the difficulty of obtaining a remedy for his situation which is the reason he also has an equity case

Respondent's Reply to Petition.

pending. As petitioner states at page 19 of his brief in support of his petition for certiorari:

"What is the real solution in the public interest? Even if it be constitutionally possible to hold the owners and pilots of aircraft in interstate flights liable for damages, the remedy is illusory. The remedy by injunction is not a solution because by the time an injunction action is brought, the public investment is already in the airport. The real solution is to place the liability upon the municipalities who build the airports, thus applying the principles enunciated in the Causby case. The cost of the easements is a small addition to the airport cost, all of which is passed on by landing fees and rental charges to the airlines and by them in turn to the traveling public in the form of fares."

But the fact that a plaintiff may have difficulty in finding a remedy does not raise a constitutional issue which gives Your Honorable Court jurisdiction over the case. Providing expedient remedies is for the legislature and not for the court.

Of course, petitioner would like to find an expedient solution to his individual problem and of course it would simplify his problem if the County did take his property, but the fact of the matter is that the County has not taken his property and the petitioner's disappointment in the Pennsylvania Supreme Court's finding that the County has not taken his property is certainly no reason to grant his petition for certiorari.

Respondent's Reply to Petition.**III. Conclusion**

The petition for writ of certiorari should be denied on the ground of lack of jurisdiction. Conceding arguendo that this Honorable Court has jurisdiction, the petition should be denied because this case does not present a fundamental question of constitutional law which merits review.

Respectfully Submitted,

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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner,

v.

COUNTY OF ALLEGHENY

**On Writ of Certiorari to the Supreme Court of
Pennsylvania**

BRIEF FOR PETITIONER AND APPENDICES

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

NO. 81

THOMAS N. GRIGGS, Petitioner,

v.

COUNTY OF ALLEGHENY

BRIEF FOR PETITIONER

OPINIONS OF THE COURTS BELOW

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 402 Pa. pp. 411 and 420, respectively, and appear in the Record at pages 80 and 88, respectively. The opinions of the Court of Common Pleas of Allegheny County, Pennsylvania, are reported at 108 P.L.J. 65, and appear in the Record beginning at page 58; the Report of the Board of Viewers (unreported) appears in the Record beginning at page 28.

JURISDICTION

The decision of the Pennsylvania Court sought to be reviewed was entered January 16, 1961. The order denying Reargument was entered February 15, 1961.

The jurisdiction of your Honorable Court is invoked under Title 28 U.S.C., Section 1257 (2) and (3).

*Questions Involved.***QUESTIONS INVOLVED**

1. Whether there was an unconstitutional "taking" by the County of Allegheny of the airspace above petitioner's property situate in the approach zone or path of glide where the pattern of flight established by the Civil Aeronautics Board for aircraft landing at and departing from the Greater Pittsburgh Airport, a major public airport owned and operated by the County, requires aircraft regularly and frequently to fly at low altitudes over petitioner's property thereby depriving him of his use and enjoyment thereof?

2. Whether the remedy suggested by the Pennsylvania Supreme Court, that is, tort actions against airlines and pilots, is illusory and impossible of enforcement and therefore lacking in due process?

3. Whether that decision, which, if followed, would subject airlines and pilots to actions for damages and possible injunctive proceedings though operating their aircraft in full compliance with the rules and regulations of the Civil Aeronautics Board, would be an attempt by the State to regulate in a field occupied exclusively by the Federal Government and be in conflict with the Federal Acts dealing with air commerce and the commerce clause of the Constitution of the United States?

*Statement of the Case.***CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The applicable provisions of Article 1, Section 8, Clause 3, of the Constitution of the United States, the Fifth and Fourteenth Amendments thereto and the applicable provisions of the federal acts governing air commerce are reproduced in Appendix A herein. The applicable provisions of Article 16, Section 8 of the Pennsylvania Constitution and the applicable provisions of the Pennsylvania statutes are reproduced in Appendix B herein.

STATEMENT OF THE CASE

The Greater Pittsburgh Airport is a public improvement constructed and maintained by the County of Allegheny (a political subdivision of the Commonwealth of Pennsylvania) to provide airport and air transport facilities for the use of the general public and is one of the major facilities of the commercial and civilian transportation system of the United States and is a major instrumentality in the commerce and postal system. (R. 5-6)

Prior to 1952 the County acquired land in Moon and Findlay Townships, in the western portion of the County, and proceeded to the erection of the Greater Pittsburgh Airport and air transport facilities for the use of the general public in conformity with the rules and regulations of the Civil Aeronautics Administration within the scope of the "National Airport Plan" as provided for in the Federal Airport Act, 49 U.S.C.A. 1101. (R. 31)

Statement of the Case.

In compliance with those rules, the County laid out and submitted for approval a Master Plan of the airport which included the "approach areas" and the Master Plan was duly approved by the Civil Aeronautics Administration. (R. 32)

The County entered into certain agreements with the Administrator of Civil Aeronautics with respect to the operation of said airport and particularly with regard to the approach standards required for safe operation. Among those agreements were several so-called Grant Agreements wherein the County as "Sponsor" received substantial funds from the United States Government pursuant to the provisions of the Federal Airport Act, *supra*. The Grant Agreements provided, among other things, that the County would adopt a zoning ordinance and acquire easements in land or airspace within or without the boundaries of the airport where necessary for the safe operation of aircraft in and out of the airport. (R. 32)

The property, subject of this litigation, is located in the approach area to the Northeast runway approximately 3,250 feet from the end of the runway at the airport. The portion of the petitioner's property within said Northeast approach area is situate on a hill and contains a residence, garage, stone cottage, tennis courts and elaborate landscaping, and 6.1 acres of land, more or less. (R. 33)

The approved and established standards for the approach area for the Northeast runway provided for a center line extended 10,000 feet beyond the "clear zone" at the end of the runway with gradient of 1 on 40 having a splayed slope surface with lateral width ex-

Statement of the Case.

tended uniformly from 500 feet at the end of the runway to 2,500 feet at the end of the center line projected 10,000 feet therefrom. (R. 32)

The elevation at the end of the Northeast runway is 1150.50 feet above sea level; the door sill at petitioner's residence (which is on a hill) 1183.64 feet; the top of the chimney 1219.64 feet. The slope gradient of the approach area is as 40 is to 3250 feet (the distance of petitioner's house from the end of the runway) or 81 feet, thus leaving a clearance of 11.36 feet between the bottom of the glide angle and the chimney of the petitioner's residence.

The Greater Pittsburgh Airport was opened for public use on June 1, 1952, as provided for by resolution of the Commissioners of Allegheny County. Since that time the airport has been used by all commercial aircraft serving Pittsburgh and Allegheny County. Prior to that date the County had entered into leasehold agreements conforming to the rules and regulations of the Civil Aeronautics Authority with several commercial airlines to use the Greater Pittsburgh Airport, granting to them, inter alia, the right to land and take off at said airport. (R. 33)

Since the opening of the airport, the Northeast runway with its approach area has been in regular operational use for landing and taking-off of commercial and other aircraft in regular flight patterns at heights near and over petitioner's residence from take-off being from 30 to 300 feet and on letdown from 53 feet to 153 feet. (R. 33)

The flights are therefore below the safe navigable airspace of 500 feet as prescribed in "Minimum Safe

Statement of the Case.

Altitudes", Regulation 60.17 of the Civil Aeronautics Board. (Appendix A)

The low flight of aircraft over petitioner's property interfered with his existing use and enjoyment thereof. The interference resulted from the noise, disturbances and vibrations created by such airplanes as well as the fear for personal safety caused by the low flights in close proximity to the petitioner's residence; said noise of planes over petitioner's property on let-down to the Northeast runway being comparable to that of a noisy factory, and on take-off to the noise of a riveting machine or steam hammer. (R. 33)

The low altitude flights over petitioner's property caused the petitioner and occupants of his property to become nervous and distraught, eventually causing their removal therefrom as undesirable and unbearable for their residential use (R. 33-34)

The Dissenting Opinion relates the effect of the low flights in this manner:

"Regular and almost continuous daily flights, often several minutes apart, have been made by a number of airlines directly over and very, very close to plaintiff's residence. During these flights it was often impossible for people in the house to converse or to talk on the telephone. The plaintiff and the members of his household, (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flight and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down

Statement of the Case.

from the walls and ceilings; their health was affected and impaired, and they sometimes were compelled to sleep elsewhere. Moreover, their house was so close to the runways or path of glide that as the spokesman for the members of the Airlines Pilot Association admitted 'If we had engine failure we would have no course but to plow into your house.' Moreover, the flights were endangered by plaintiff's trees and vice versa. . . ." (R. 89-90)

Several months after the opening of the airport, petitioner and other property owners similarly situated discussed the matter of the impact on them and their property with representatives of the County and commercial airlines in an effort to secure some relief from the conditions, but all disclaimed responsibility. The petitioner and other property owners thereafter filed actions in equity in the Court of Common Pleas of Allegheny County against the County and the several airlines in an effort to have that Court determine (1) whether there had been a "taking" of the property by the County as owner and operator of the Airport and the property owners being entitled to compensation therefor, or (2) whether the low flights were repeated trespasses for which the airlines were solely liable and for which injunctive relief would be granted. After much delay caused by preliminary objections raised by the County and airlines, followed by appeal to the Supreme Court of Pennsylvania, the latter Court finally ruled that equity could not determine on the pleadings that there was a "taking". *Gardner v. Allegheny County et al.*, 328 Pa. 88, 393 Pa. 120. This is the proceeding to which Mr. Justice Bell refers in his Dissenting Opinion. (R. 88)

Statement of the Case.

Based upon the answers eventually filed by the County and airlines in the equity proceedings, wherein both declared that the low flights were necessary to get in and out of the airport and were in compliance with the rules and regulations of the Civil Aeronautics Board, the petitioner filed in the Court of Common Pleas of Allegheny County a Petition for Appointment of Viewers under the condemnation statutes of the Commonwealth of Pennsylvania to declare a taking by the County and to award damages therefor, and this litigation is the result of such proceeding. (R. 1, et seq.) Action on similar petitions by other property owners has been stayed pending the final determination of this case.

Pursuant to the procedure in such case, the Viewers conducted a view of the property and thereafter held a hearing at which various exhibits, including the Master Plan of the Greater Pittsburgh Airport, were introduced and testimony of petitioner and his witnesses was taken. The County presented no testimony and there is no issue of fact to be determined.

For the first time the information with respect to Master Plan and agreements with the federal government and the airlines as set out herein were made available to the petitioner at the hearing before the Board of Viewers.

The Viewers thereafter filed their Report with the Court of Common Pleas of Allegheny County, as provided by statute, in which they found that by reason of the burden imposed on petitioner's property by the necessary low flights, there was a "taking" by the County of a superterranean easement over petitioner's property effective 12.01 a.m. on June 1, 1952, the date the County

Statement of the Case.

Commissioners had by resolution designated the opening of the airport for public use. The Viewers found the facts substantially as related above and held that the petitioner's property had been damaged and made an award of compensation to him. (R. 37)

The Court of Common Pleas of Allegheny County in due course dismissed all exceptions and sustained the Viewers' Report and Award.

On appeal to the Pennsylvania Supreme Court the Majority Opinion of that Court rejected the County's contention that such low flights were within the navigable airspace but denied that there was a "taking" by the County and vacated the Viewers' Report and Award.

While conceding, as the undisputed testimony disclosed, that petitioner's property had been damaged, it held that the petitioner's action for relief under the facts would seem to be against the owners and/or pilots of the aircraft under the provisions of Section 403 of the Pennsylvania Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. 1469, which reads in part as follows:

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom in accordance with the rules of law applicable to torts on land in this Commonwealth."

Mr. Justice Bell (now Mr. Chief Justice Bell) filed a Dissenting Opinion, joined in by Mr. Justice Eagen, (R. 88) in which he held that the principles enunciated in

Statement of the Case.

United States v. Causby, 328 U.S. 256, are applicable to the facts in this case and consequently there was a "taking" of petitioner's property by the County; that the County knew the approaches or path of glide were regulated by the Civil Aeronautics Authority; that the regulations made it necessary for aircraft to fly low over petitioner's property in landing and taking off at the airport; that the approach area to an airport is analogous to an approach to a bridge or subway; that the need for easements in airspace in the approach areas was within the contemplation of the County and the Civil Aeronautics Board in that the County, in consideration of the advance of funds by the federal government, agreed with the Civil Aeronautics Board, inter alia, to acquire such needed air easements; that the remedy prescribed by the majority is illusory and will not result in just compensation to the petitioner. His opinion discusses most of the facts adduced before the Board of Viewers and, we believe, correctly states the applicable law.

Petitioner filed petition for reargument with the Pennsylvania Supreme Court but reargument was refused on February 15, 1961. The matter now comes before your Honorable Court on Certiorari to the Supreme Court of Pennsylvania granted by your Honorable Court on June 5, 1961.

Summary of Argument.

SUMMARY OF ARGUMENT

I. Fifth and Fourteenth Amendments

The Pennsylvania Supreme Court has ruled that a political subdivision of the state which erected, owns and operates a major public airport is not liable for a taking of the airspace above private property situate in an approach zone in close proximity to the airport and subject to regular and frequent flights of aircraft at necessarily low altitudes and under the direction of federal aviation authorities as a result of which burden the property owner's use and enjoyment of the property has been destroyed. This holding by the Pennsylvania Supreme Court is contrary to the decision of your Honorable Court in *United States v. Causby*, 328 U.S. 256, and is in violation of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States and Article 16, Section 8 of the Constitution of Pennsylvania in that private property has been taken for public use without just compensation to the owner.

II. Due Process Clause

The relief suggested by the Pennsylvania Supreme Court is procedure against the airlines under a section of the Pennsylvania Aeronautical Code (1933) which is applicable only to damages caused by accident or negligence and not to damages caused in the regular flight of aircraft. Actions against airlines, whether under that statute or in the ordinary form of trespass, could not be successfully prosecuted because of the impossibility of determining and allocating the damages among the individual airlines serving the airport. The proof required to fix each airline's liability is impossible of attainment

Summary of Argument.

by reason of the character of air transportation. The Pennsylvania Supreme Court has not provided a remedy which would enable the landowner to recover just compensation for his damages and he has therefore been deprived of his property without due process of law.

III. Conflict with Federal Control of Air Commerce

Under the decision of the Pennsylvania Supreme Court, the landowner, being unable to recover damages from the airlines in the procedure which it suggests, would be entitled to bring injunctive actions against the individual airlines to restrain the repeated trespasses or low flights over his property. Such injunctive relief, if granted, would result in interruption of air traffic to and from the major public airport on such days as the particular approach zone for safety reasons was required to be used. Since federal control of air commerce is exclusive, *Northwest Airlines v. Minnesota*, 322 U.S. 292, injunctions issued by a state court would appear to be in conflict with the federal air commerce acts as well as the commerce clause of the United States Constitution on which such acts are bottomed.

*Argument.***ARGUMENT****I.**

There Was a "Taking" of Petitioner's Property Under Authority of United States v. Causby, 328 U.S. 256, for Which Petitioner Is Entitled to Just Compensation Under the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 16, Section 8, of the Constitution of the Commonwealth of Pennsylvania.

This case concerns damages to petitioner's real property caused as a direct result of the operation of the Greater Pittsburgh Airport and the flight of aircraft into and out of it. The Supreme Court of Pennsylvania says there was no "taking" by the County as owner and operator of the airport but indicates that petitioner's rights are against the airlines in tort actions under a section of the Pennsylvania Aeronautical Code, later to be discussed herein.

In *United States v. Causby*, 328 U.S. 256, your Honorable Court decided that the low flight of military planes landing at and taking off at an airport leased by the United States, constituted a "taking" within the Fifth Amendment for which the United States was liable. You said at pages 264 and 265:

"As we have said, the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. * * * The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself and we think that the

Argument.

landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface."

Again, at pages 266, 267:

"Flights over private land are not a taking, unless they are so low and frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of fact of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land."

Insofar as petitioner knows, no other case involving taking by flights of aircraft has been before your Honorable Court, but the principles it established have been followed by the Federal Courts in many cases, including: *Highland Park, Inc. v. United States*, 161 F. Supp. 597; *Freeman v. United States*, 167 F. Supp. 541; *Cravens v. United States*, 163 F. Supp. 309; *Adaman Mutual Water Company v. United States Court of Claims*, decided October 8, 1958; *Ralph Dick et al. v. United States*, 169 F. Supp. 491; *Hopkins v. United States*, 173 F. Supp. 245 (Advanced report—July 13, 1959); and *United States v. Ashcraft et al.*, 176 F. Supp. 447.

Under the authority of the Causby case, the Supreme Court of Washington, in the case of *Ackerman v. Port of Seattle*, 348 P.2d 664, decided that the Port of Seattle was liable for the taking of Ackerman's property by the necessary flights of commercial planes in landing and taking off at the Seattle airport. It is to

Argument.

be noted that the provisions of the Washington Constitution are identical to those of Pennsylvania, and both, of course, are similar to the applicable provisions of the Federal Constitution.

With the exception of the operation of the airplanes, all the elements which your Honorable Court in the Causby case, *supra*, held to constitute a "taking" of private property are present here — the petitioner's property is located in close proximity to the airport; it is situate in the prescribed "approach area" or path of glide which must be followed by aircraft landing at and departing from the airport; the flights are regular and frequent and at such necessarily low altitudes over petitioner's property (lower than in Causby) as actually to destroy petitioner's use and enjoyment of the property and to greatly depreciate it in value.

In Causby, *supra*, the United States operated both the airport and the aircraft; therefore, the determination as to whether there was a "taking" of petitioner's property by the County when the Greater Pittsburgh Airport was opened for public use depends upon the obligations assumed by the County when it undertook to construct and operate the airport for public use.

The Majority Opinion of the Supreme Court of Pennsylvania holds that, solely for the reason that the County does not control the operation of the aircraft, there is no taking by the County. While it acknowledges that the airport was constructed according to a "Master Plan" submitted to the Civil Aeronautics Board for approval, it appears to assume that such procedure was more or less of a perfunctory or routine nature.

Argument.

As illustrative of the Majority Opinion's failure to appreciate the significance of the requirements for a Master Plan is its following comment:

"... But the drafting, submission, and approval of the plan did not give the County an easement of avigation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise." (R. 86)

It is true that these factors did not "give" the County an air easement but the contention specifically is that by reason thereof the County "took", or appropriated, such air easement without following the lawful method provided by the Pennsylvania statutes for the acquisition thereof. Further, the statement that the action did not deprive petitioner of any use or enjoyment of the property is rather difficult to understand in view of the positive record of damage made before the Board of Viewers and the findings of that Board as set out on pages 33 and 34 of the Record and which findings are not in dispute.

The County, fully realizing that air commerce is within the exclusive control of the federal government by reason of the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938 (now the Federal Aviation Act), proceeded to erect an airport in conformance with the National Airport Plan as provided for in the Federal Airport Act, 49 U.S.C.A. 1101. That act recognizes that "airport development" does include "any acquisition of land or of interest therein or of any easement through or in airspace which is necessary to permit any such work or to remove or mitigate or prevent or limit the

Argument.

establishment of airport hazards." 49 U.S.C.A. 1101 (A 3).

The County, as Sponsor, being a public agency within the meaning of the Act, applied to the Administrator of the Civil Aeronautics Board for the grant of funds in connection with the development of the airport as provided in said Act.

Not only was it required under the Act and in the agreements which it entered into with the Administrator to provide proper and safe approach areas to the several runways at the airport, but in the Grant Agreements executed by it and the Administrator for the United States Government it specially agreed that:

"(i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land *either within or outside the boundaries of the Airport* in any manner (* * *) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by *the acquisition of easements or other interests in lands or airspace, or by both such methods.*" (Emphasis added) Paragraph 8 (i) of said Agreement (R. 104)

The Federal Airport Act specifically provides in 49 U.S.C.A. 1101, page 420:

"If and when any such offer (of funds) is accepted in writing by the sponsor or sponsors to which it is made, such offer and acceptance shall comprise a grant agreement constituting an obli-

Argument.

gation of the United States and of the sponsor or sponsors so accepting, . . ." (Emphasis added.)

Furthermore, the lease agreements with the several airlines provided that the airlines should have the privilege of landing at and taking off from the airport.

The Majority Opinion failed to consider the County's direct obligation as owner and operator of the airport, its agreements with the federal government under the Federal Airport Act, its agreements with the airlines that they can land at and take off from the airport. It likewise ignored the specific provisions of the Airport Zoning Act of the Commonwealth of Pennsylvania of 1945, P. L. 237 (2 P. S. 1550), Section 5 and 14 (Appendix B), both of which contemplate specifically that where the zoning regulations are so onerous in their application to the structures or parcels of land as to constitute a taking in violation of the Constitution of the state or the Constitution of the United States, the public body, (the County), as owner of the airport, may acquire by purchase, grant or condemnation in the manner provided by law (under which a political subdivision is required to acquire) such air right avigation easement or other estate or interest in property as may be necessary to effect the purpose of the Act.

The matter of liability of the owner of the airport for the acquisition of necessary air avigation easements and the approaches to the airport was fully considered in *George Ackerman v. Port of Seattle*, supra. In that case the Port Authority owned and operated the airport as does the County here. The court makes an exhaustive analysis of the law applicable to the several phases that are also involved in this litigation and says at page 671:

Argument.

"... We must now take up the question of whether, under the facts alleged, the Port—which operates no planes—can be liable for the alleged taking. As we earlier noted, the liability of the Port in appellant's complaints is predicated on the Port's alleged failure to provide adequate facilities, necessitating the frequent low flights over the appellant's land (and thus, as we have seen, through the appellant's private airspace). Having the power to acquire an approach way by condemnation, the Port, allegedly, failed to exercise that power, with the result that the appellant's private airspace is allegedly being used as an approach way, without just compensation first having been paid to them. *Clearly, an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed*, if the private airspace of adjacent landowners is not to be invaded by airplanes using the airport. The taking of an approach way is thus reasonably necessary to the maintenance and operation of the airstrip." (Emphasis added)

A clear cut statement of the liability of a municipality for the damage done to private property located in a glide path is contained in a Pennsylvania lower court decision, *Reynolds et ux. v. Wilson et al.*, 67 D. & C. 286, in which the Court says at page 291:

"Why should a municipality which owns an airport, or its lessee, be permitted to appropriate a glide path over the lands of the adjoining owner? If the municipal airport could not be reached by land without passing over the property of an adjoining owner no one would contend for a right of passage without compensation. The flight path

Argument.

within a few feet of plaintiffs' dwelling appropriates something just as real and probably of more value than a right of way over the surface. The City of New Castle has the power to acquire land for a right of way over the surface through the power of eminent domain. It has the same power to condemn a right of way through the air. Why should it not do so?"

To the same effect, *Delta Air Lines Corp. v. Kersey*, 193 Ga. 862.

The *Harvard Law Review* of June 1961, Volume 74, No. 8, contains an article beginning on page 1581 dealing with "Airplane Noise". The writer discusses in detail the various aspects of airplane noise and with particular relation to the effect upon the landowners whose properties are near the airports. While the writer of the article does not attempt to supply a solution of the various problems mentioned in the article, he does make the following observation with regard to liability of an owner of an airport at page 1587:

"... Although aircraft make noise during all stages of flight, only when they are flying at extremely low altitudes—usually during take-offs and landings—do they substantially interfere with the landowner's interests. While such low-level flight is admittedly essential to air travel, plane owners have no control over the location of landing fields. It may be unfair to penalize them for the airport owner's selection of a site which makes inevitable the annoyance of large numbers of residents. Casting the primary liability on the airport owner will give him a strong incentive to minimize the noise

Argument.

problem. He controls not only the location of the field but also the runway layouts, which govern the general direction of the flight paths used for approach and departure; he is therefore most capable of averting the problems created by low-level flight. Further, the discretion initially to determine the size of the land area set aside for the airport and the power subsequently to purchase additional adjacent tracts provide the airport owner with one of the few effective solutions to the aviation noise problem."

Mr. Justice Bell (now Mr. Chief Justice Bell) supports the position of the Board of Viewers (R. 35) that an "approach" to an airport is analogous to an "approach" to a bridge. A bridge is useless without proper approaches and similarly the purposes of a public airport can only be accomplished by use of approaches which meet the requirements of safety in flight. An approach is therefore a part of the bridge and likewise an approach is a necessary part of an airport.

In addition, Mr. Justice Bell makes clear that by the terms of the contract with the federal government the duty and legal obligation to acquire land, buildings, easements and other interests in land and in airspace which, unless acquired, would create a hazard to the landing, take-off, paths of glide, descent paths and authorized flights of aircraft, or otherwise limit the safety, usefulness and adequacy of the airport was clearly and unquestionably that of the County of Allegheny. He summarizes as follows:

"... It follows that the County is liable to the plaintiff (1) under and by virtue of the well and

Argument.

settled Common Law principle of sic utere tue ut alienum non laedes, and (2) under the United States v. Causby case, and (3) by reason of the aforesaid contract which the County made and entered into with the United States of America." (R. 98)

Under the Air Traffic Rules of the Civil Aeronautics Board (Appendix A) the safe navigable airspace over noncongested areas is 500 feet. Had petitioner's property been located in other than the approach zone aircraft would have been required to maintain a minimum height of 500 feet over the property. Being situated in the approach zone, the flights varied from 30 to 300 feet.

It is respectfully submitted that since the County undertook to erect and operate a major public airport, it was required to acquire in the manner provided by law all property needed for that purpose including air easements or rights of way necessary to give safe access to the public improvement. In addition, it also entered into a written agreement with the federal government in which it agreed to acquire necessary air easements but failed to take the lawful steps available to it under the Pennsylvania statutes to effect such acquisition. We submit therefore that the action of the County amounted to an unconstitutional taking of petitioner's airspace immediately upon the opening of the Greater Pittsburgh Airport for public use and the County then became liable to the petitioner for the diminution in value of the property by reason of the servitude imposed upon it.

*Argument.***II.**

The Decision of the Supreme Court of Pennsylvania Deprives Petitioner of His Property Without Due Process of Law Because (1) The Statute Under Which That Court Suggest Action Be Taken Against the Airlines Is Not Applicable to Normal Movement of Air Traffic, and (2) It Is Impossible to Determine and Apportion the Damages Among the Respective Airlines in Trespass Actions.

A. The Section of the Pennsylvania Statute Suggested by the Pennsylvania Supreme Court Does Not Authorize Action For Damages to Property Caused in the Regular Movement of Air Traffic.

The Majority Opinion's casual consideration of this case is apparent from its statement that the relief which petitioner claims under the authority of the Causby case *would seem* to be covered under Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, P.S. § 1469, which provides, in part, as follows: (Emphasis added)

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for damages to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth."

Argument.

A discussion of the history of this paragraph is contained in *Prentiss v. National Air Lines, Inc.*, 112 F. Supp. 306, at page 314. The litigation related to death actions resulting from the three airplane crashes at Elizabeth, New Jersey, in December, 1951, January, 1952, and February, 1952. Suits were brought under the authority of a similar statute enacted by the State of New Jersey. The airlines attacked the constitutionality of the Act on the ground that the absolute liability imposed on them by the Act was a deprivation of property without due process and that it imposed an undue burden on interstate commerce.

The notes to this decision recite that the Commissioners on Uniform State Laws promulgated a Uniform Aviation Liability Act in or around 1922, of which this section was a part. New Jersey enacted it in 1929; the Pennsylvania Legislature adopted it in 1929 under the title, "State Law for Aeronautics" which was later repealed and adopted as "The Aeronautics Code", (1933 May 25, P.L. 1101, Article 1 Section 101 et seq. 2 P.S. 1460-1486).

The Trial Court held that this section of the uniform statute was valid and the imposition of absolute liability was not a deprivation of due process. It disposed of the contention of alleged restraint on interstate commerce as follows:

"Defendants further attack the validity of these statutory provisions as an invalid restraint upon interstate commerce. The statutory provisions in question clearly show that:

- "(1) They do not affect the actual movement of airplanes in interstate commerce.

Argument.

- "(2) They do not affect the average airplane, even financially, as would a tax.
- "(3) They only affect an airplane owner financially *on the occurrence of an accident. Such an accident the defendant owners will certainly agree is not the ordinary result of air travel.* (Emphasis added)
- * * * * *

"The few authorities cited by defendants as in their support are so dissimilar in fact as not to be analogous. Nor do the statutory provisions in question conflict with Congressional control of interstate commerce. *The field covered by them is entirely different from that covered by the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq.*" (Emphasis added)

The interpretation of this particular section later came for review before the Supreme Court of New Jersey in *Adler's Quality Bakery, Inc. v. Gasteria, Inc.*, 159 Atl. 2d 97. In that case Gasteria's plane collided with a television tower in North Bergen, New Jersey. Numerous claims were made by persons living or working in the immediate area of the tower and involved damage to real and personal property caused by precipitation to the earth of the debris. There were twenty-five claims joined in the one action. Gasteria, owner of the plane said the New Jersey statute was unconstitutional under the Fifth Amendment and the commerce clause. The New Jersey Supreme Court denied Gasteria's contentions and followed the Prentiss case, *supra*, including the holding that the section related to damages arising out of an accident.

Argument.

A case bearing on this provision of a similar statute of the State of Maryland has only recently (April 19, 1961) been decided by the U. S. District Court—Maryland. *Harold Weisberg et ux. v United States of America*, 193 F. Supp. 815 (Federal Supplement Advance Reports, July 10, 1961). The Court distinguishes between damage to property which would constitute a taking under the Causby case and damage under this section due to an accident or negligent operation of helicopters.

The County never sought to evade its liability under authority of the section of the Pennsylvania statute suggested by the Pennsylvania Supreme Court, and we have no doubt that counsel for the County were as surprised as we were that the Majority Opinion suggested this "way out" for the County. Throughout the litigation in the state courts, both in the equity cases and these condemnation proceedings, the County's position has invariably been that the low flights are lawful and within the navigable air space and immunized by Act of Congress; that it does not control the aircraft; that every flight has been in accordance with regulations and in airspace through which Congress said there is an absolute freedom of transit; that the County constructed the airport in accordance with plans approved by the Administrator of the Civil Aeronautics Authority and therefore the County is not liable. This is substantially the same argument that was made by the government in the Causby case.

Since the Pennsylvania Supreme Court has suggested no other remedy, and as airlines do not have the power of condemnation, the only possible procedure by the petitioner to protect his rights would be in the nature

Argument.

of trespass action against the individual airlines for damages and/or injunctive relief from the repeated trespasses over his property.

B. It is Impossible to Determine and Allocate Damages Among the Airlines in Trespass Actions.

Even though the section of the Aeronautical Code suggested by the Pennsylvania Supreme Court would not be applicable as discussed above, in any form of trespass or tort action against the airlines it would be impossible as a practical matter to fix the individual liability of the respective airlines for the damages sustained by the petitioner caused by the low flights over his property.

In order to illustrate the practical impossibility of such proof we have included in the Record before your Honorable Court several pages of the petitioner's testimony before the Board of Viewers in which he relates instances of the low flights as observed by him. (R. 18 et seq) This testimony makes clear the insuperable difficulty of ascertaining and apportioning the damages among the aircraft, commercial or otherwise, using the glide path over his property. While he was able to identify some of the planes, he could not name all and certainly none which passed over his home at night and which disturbed its occupants. The testimony before the Board of Viewers disclosed that as of June 1, 1952, there were in excess of two hundred scheduled commercial flights in and out of the Greater Pittsburgh Airport; it is not conceivable that a property owner would be able to name or even make a sensible guess at the number and owners of planes flying low over his property on any particular day that the Northeast runway was in use.

Argument.

We have also included another part of the Record before the Board of Viewers in which it is disclosed that there is no permanent record kept of the flights in and out of the airport, such records being on tape and destroyed at the end of thirty days. And, furthermore, *no record is kept or maintained at any time to show the specific runway or glide path used by the planes to land at and take off from the airport.* (R. 28)

The article in the *Harvard Law Review* for June, 1961, *supra*, at page 1586, has this to say with respect to the problem:

"... It therefore seems improper to hold any single plane owner liable for the full damages sustained by a landowner. Some apportionment of damages among the various users is necessary so that the individual liability of each will reflect his proportionate contribution to the total harm. Yet it would be virtually impossible for any landowner to prove the extent to which each owner's planes cause noise interference. He would have to sue numerous defendants, each of whom would presumably attempt to shift liability to the others. *The consequence is likely to be protracted litigation in which the landowner fails to recover.*" (Emphasis added)

Mr. Justice Bell's Dissenting Opinion vigorously points out the impossibility of proving damages against any of the airlines or others in this manner:

"The majority opinion clearly implies that the injury or taking was by the Airlines. While this is irrelevant in the present case since the Airlines are not parties hereto, I believe that under the facts herein this position is legally unsound and realistically im-

Argument.

possible. None of the companies which fly the airlines nor the pilots are clothed with the power of eminent domain. They follow implicitly the law, the regulations and the orders of the Government of the United States or one of its agencies. They are, figuratively speaking, impotent slaves of the Federal Aviation Agency on their flights, their take-offs, their paths of glide and descent paths, and their landings. Moreover, it would be realistically impossible for a property owner to prove which Airlines damaged his property and to what extent each damaged his property. It would require a property owner to sit day and night outside his home or building for weeks or months to determine which Airline did what, and to allocate the damage and the blame, and exactly what moment of the day, week, month, or year it occurred. . . ."

It is clear that the petitioner should not be placed in the position where he must futilely attempt to enforce a claim against the Airlines for compensation for the diminution in the value of his property caused by the low flights over it and therefore it is equally clear that he has been deprived of his property without due process of law.

*Argument.***III.**

The Decision of the Supreme Court of Pennsylvania Is in Conflict With the Commerce Clause and the Federal Statutes Covering Air Commerce in That It Would Penalize and Restrain the Airlines Notwithstanding Their Planes Land at and Take Off From the Airport in Strict Conformity to the Regulations and Under the Directions of the Responsible Federal Agency.

The damages to petitioner's property are caused by the repeated low flights of aircraft over his property in landing at and departing from this airport. Under the rationale of the Supreme Court of Pennsylvania in this case, those low flights are considered to be trespasses for which petitioner is entitled to relief from the airlines. Not being able to determine the damages caused by any particular flight or airline and apportion them, the only remedy available to the landowner would be to apply for injunctive relief against all owners of aircraft flying in and out of the airport.

Since the damages are caused by the normal and prescribed flights of planes, and not as a result of accident or negligent operation, the question would naturally arise as to whether the granting of injunctive relief by a state court, thus restraining the operation of planes in and out of the airport, would in effect be an attempt to regulate air commerce and be in conflict with the federal acts dealing with air commerce.

It would undoubtedly be contended that such action by a state court would be analogous to the attempt by the Village of Cedarhurst, New Jersey, to control the

Argument.

height of planes flying over the Village in landing at and departing from the Idlewild Airport. (*Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871). The Village adopted an ordinance which purported to make it unlawful for any person to operate an aircraft at an altitude of less than 1000 feet over the Village and imposed a penalty of \$100 for each violation of its prohibitions. Suit was brought in the United States District Court for the Eastern District of New York by the airlines using the Idlewild Airport, Airlines Pilots Association and individual pilots to declare the ordinance unconstitutional and to enjoin the Village from the enforcement of its ordinance.

The trial court held that under the Commerce Clause, Article 1, section 8, clause 3 of the Constitution, Congress had power to regulate the flight of aircraft in interstate and foreign commerce, that this power was exercised by the Air Commerce Act of 1926, 49 U.S.C.A. § 171 et seq., the Civil Aeronautics Act of 1938, 49 U.S.C.A. § 401 et seq.,* and the Regulations of the Civil Aeronautics Board and the Administration of Civil Aeronautics, that thereby the federal government preempted the field of air traffic regulation, and that the ordinance, which plainly conflicts with the federal statutes and regulations, was invalid. The decision was affirmed by the Court of Appeals in *Allegheny Airlines v. Village of Cedarhurst*, 238 F.2d 812. So far as property damage is concerned, both decisions recognized the rule in the Causby case but held that the facts did not war-

* The provisions of these acts are now reenacted in the Federal Aviation Act, August 23, 1958, 72 Stat. 737, 49 U.S.C.A. 1301 et seq.

Argument.

rant the application of the Causby doctrine to land-owners in the Village who were parties to the litigation.

In the Cedarhurst case the flights of aircraft did not operate continually over the Village; the flights varied from 450 feet to 1500 feet, most of them being in excess of 1000 feet. In the case at bar the flights varied from 30 to 300 feet and are regular and frequent.

Any action brought in a state court under the theory of the Pennsylvania Supreme Court, whether for damages or for injunctive relief, would necessarily be on the allegation that the low flights were unlawful trespasses. The anomaly would be that those low flights even though not within the safe navigable airspace are made necessary in order to land at or take off from the airport, that they are made in compliance with the requirements and under the direction of the Civil Aeronautics Board and are necessary in order to accomplish the purpose of the federal acts to promote air commerce.

The *Harvard Law Review* for June, 1961, *supra*, has this to say at page 1587 on that subject:

"... Once the airport has been constructed, federal regulations—and federally operated control towers at most commercial airports—require planes to fly particular approach patterns and altitudes. *Any deviation from these prescribed modes of operation, even in an effort to reduce noise disturbance, would be unlawful and would jeopardize flight safety.*" (Emphasis added)

That Congress intended to preempt the field of air traffic regulation is succinctly set forth in the opinion of Mr. Justice Jackson in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944), where he stated at page 303:

Argument.

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

The Pennsylvania Legislature has recognized the supremacy of the federal government in the field of air commerce by specifically subordinating its powers to that of the federal government. We have included in Appendix B certain of the provisions of the Aeronautical Code, Act of 1933, P.L. 1001, 2 P. S. § 1460 et seq., which direct the Pennsylvania Aeronautical Commission to adopt rules not in conflict with airspace reservations established by the federal government, that all rules and regulations shall be consistent with and conform to the then current federal legislation governing aeronautics and the regulations promulgated thereunder and rules issued from time to time pursuant thereto. Certain other sections require that aircraft operating in Pennsylvania meet federal requirements.

It is undoubted that a state may not adopt legislation in conflict with the federal air commerce acts. The

Argument.

question here is, does the decision of the Supreme Court of Pennsylvania conflict with those acts by allowing damages against airlines and pilots, or restraining the operation of planes, when in fact the planes are operating in strict compliance with the rules and regulations of the federal body which has exclusive jurisdiction over their operations?

Should actions be brought against the airlines for damages and/or injunctive relief, not only would they be opposed by the airlines on the ground that the low flights are privileged, but it is certain that the Civil Aeronautics Board and the Federal Aviation Agency (as in *Allegheny Airlines v. Village of Cedarhurst*, supra) would intervene on the basis that the awarding of damages against the airlines or the granting of injunctive relief restraining the low flights would be in violation of the air commerce acts and an unlawful interference with interstate commerce. Furthermore, it is assumed the County would likewise seek to intervene in order to protect the flow of air traffic in and out of the airport.

It is almost certain that a Pennsylvania trial court would not grant injunctive relief in view of that opposition, and the landowners would be left with no remedy.

Improper planning of a public airport should not require any citizen to resort to injunctions in order to protect his rights. Such procedure places a citizen unfairly into conflict with the municipality, the federal agencies, interstate commerce and the public.

*Conclusion.***CONCLUSION**

The decision of the Pennsylvania Supreme Court under the facts in this case is repugnant to the commerce clause, the Fifth Amendment and the due process clause of the Constitution of the United States, to Article 16, Section 8 of the Constitution of the Commonwealth of Pennsylvania and is in conflict with the air commerce acts of the United States. The respondent, as owner and operator of the Greater Pittsburgh Airport, appropriated without due process of law an easement in the airspace above petitioner's property and is liable for the damages sustained under the doctrine of *United States v. Causby*, 328 U.S. 256. The judgment of the Supreme Court of Pennsylvania is, therefore, erroneous and should be reversed.

Respectfully submitted,

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*Appendix A.***APPENDIX A****Federal Constitutional and Statutory
Provisions Involved***Article 1, Section 8, Clause 3*

The Congress shall have power * * * to regulate commerce with foreign nations, and among several states * * *

Fifth Amendment—Just Compensation

* * * nor shall private property be taken for public use, without just compensation, U.S.C. Const. Amdt. 5.

Fourteenth Admendment—Due Process Clause

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * U.S.C. Const. Amdt. 14.

STATUTORY PROVISIONS**Navigable Airspace*

"As used in sections 171, 174-177, and 179-184 of this title, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of said sections. May 20, 1926, c. 344, Section 10, 44 Stat. 574; June 23, 1938, c. 601, Section 1107 (i) (1), (8), 52 Stat. 1028." 49 U.S.C. 180.

*The provisions of these acts are now reenacted in the Federal Aviation Act, August 23, 1958, 72 Stat. 737, 49 U.S.C.A. 1301 et seq.

Appendix A.

General safety powers and duties of Board; delegation of authority to Administrator

"(a) The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and revising from time to time—

"... (7) Air traffic rules governing the flight of, and for the navigation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles." 49 U.S.C. 551 (a) (7).

AIR TRAFFIC RULES

Minimum safe altitudes

"... 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary for take-off or landing* no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft ...

'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. . . .'" 14 C.F.R. Part 60, Section 60.17

Appendix B.**APPENDIX B****Pennsylvania Constitutional and Statutory
Provisions Involved****PENNSYLVANIA CONSTITUTION**

"Sec. 8. *Property taken, injured or destroyed by private and municipal corporations*

Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise; and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law." Pennsylvania Const. Article 16, Section 8.

"THE AERONAUTICAL CODE"

(1933, May 25, P. L. 1001)

2 P.S. 34

"§ 1463.1 *Commonwealth airways system*

"The Commonwealth airways system is hereby declared to consist of all air navigation facilities available for public use, now existing or hereafter established, whether publicly or privately owned, and whether natural or man-made, except those under the jurisdiction of the United States Government . . ."

Appendix B.**"§ 1464 Aircraft construction, design, and airworthiness; federal licenses**

"The public safety requiring and the advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that aircraft operating within this Commonwealth should conform, with respect to design, construction, and airworthiness, to the standards prescribed by the United States Government with respect to navigation of civil aircraft subject to its jurisdiction, it shall be unlawful for any person or resident to operate or navigate any aircraft within this Commonwealth, unless such aircraft has an appropriate, effective license issued by the United States Government, and is registered by the United States Government: Provided, however, . . ."

"§ 1465. Qualifications for airman; federal licenses

"The public safety requiring and advantages of uniform regulation making it desirable, in the interest of aeronautical progress, that a person or resident engaging within this Commonwealth in navigating or operating aircraft in any form of navigation, or while in charge of the inspecting, overhauling or repairing of aircraft, or the repairing, packing and maintenance of parachutes, shall have the qualifications necessary for obtaining and holding a license issued by the Department of Commerce of the United States, it shall be unlawful for any persons to operate or navigate, or inspect, overhaul or repair any aircraft, or repair, pack and maintain parachutes, in this Commonwealth, unless such person is the holder of an appropriate, effective license or permit issued by the United States Government: . . ."

*Appendix B.**"§ 1467. Ownership of space*

"The ownership of the space over and above the lands and waters of this Commonwealth is declared to be vested in the owner of the surface beneath, but such ownership extends only so far as is necessary to the enjoyment of the use of the surface without interference, and is subject to the right of passage or flight of aircraft. Flight through the space over and above land or water, at a sufficient height, and without interference to the enjoyment and use of the land or water beneath, is not an actionable wrong, unless said flight results in actual damage to the land or water, or property thereon or therein, or use of the land or water beneath."

"§ 1468. Lawfulness of flight

"Flight in aircraft over the lands and waters of this Commonwealth is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be dangerous or damaging to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another without his consent is unlawful, except in the case of a forced or emergency landing. For damage caused by a forced or emergency landing, the owner, lessee, and operator of the aircraft shall be liable, as provided in section four hundred three."

"§ 1469. Damage to persons and property on the ground

"The owner and the pilot, or either of them, of every aircraft which is operated over the lands or waters

Appendix B.

of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land in this Commonwealth.

"As used in this section, 'owner' shall include a person having full title to aircraft and operating it through servants, and shall also include a bona fide lessee or bailee of such aircraft, whether gratuitously or for hire; but 'owner' as used in this section, shall not include a bona fide bailor or lessor of such aircraft, whether gratuitously or for hire, or a mortgagee, conditional seller, trustee for creditors of such aircraft or other persons having a security title only, nor shall the owner of such aircraft be liable when the pilot thereof is in possession thereof as a result of theft or felonious conversion.

"The person in whose name an aircraft is registered with the United States Department of Commerce shall be prima facie the owner of such aircraft within the meaning of this section."

"PENNSYLVANIA AIRPORT ZONING ACT"

(1945, April 17, P. L. 237)

2 P.S. 46

"§ 1561. *Judicial review*

"... (5) In any case in which airport zoning regulations adopted under this act, although generally reasonable, are held by a court to interfere with the use or enjoyment of a particular structure or parcel of land to such an extent, or to be so onerous in their application to such a structure or parcel of land, as to constitute a

Appendix B.

taking or deprivation of that property in violation of the Constitution of this State, or the Constitution of the United States, such holding shall not affect the application of such regulations to other structures and parcels of land."

"§ 1563 Acquisition of air rights

"In any case in which (1) it is desired to remove, lower or otherwise terminate a nonconforming structure, or use, or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this act or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights, rather than by airport zoning regulations, the political subdivision within which the property or nonconforming use is located, or the political subdivision owning the airport, or served by it, may acquire by purchase, grant or condemnation, in the manner provided by the law, under which political subdivisions are authorized to acquire real property for public purposes, such air right avigation easement, or other estate or interest in the property or nonconforming structure, or use in question, as may be necessary to effectuate the purpose of this act. In the case of the purchase of any property, or any easement, or estate, or interest therein, or the acquisition of the same by the power of eminent domain, the political subdivision making such purchase or exercising such power shall, in addition to the damages for the taking, injury or destruction of property, also pay the cost of the removal and relocation of any structure or any public utility, which is required to be moved to a new location."

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS

COUNTY OF ALLEGHENY.

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA*

**BRIEF OF ALLEGHENY AIRLINES, INC., AMERICAN
AIRLINES, INC., EASTERN AIR LINES, INC.,
LAKE CENTRAL AIRLINES, INC., MOHAWK AIR-
LINES INC., NORTHWEST AIRLINES, INC., PAN
AMERICAN WORLD AIRWAYS, INC., TRANS
WORLD AIRLINES, INC., UNITED AIR LINES,
INC., AS AMICI CURIAE.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY.

BRIEF OF ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., LAKE CENTRAL AIRLINES, INC., MOHAWK AIRLINES INC., NORTHWEST AIRLINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC. AS AMICI CURIAE.

THE INTEREST OF THE AMICI CURIAE

This Brief is submitted on behalf of Allegheny Airlines, Inc., American Airlines, Inc., Eastern Air Lines, Inc., Lake Central Airlines, Inc., Mohawk Airlines Inc., Northwest Airlines, Inc., Pan American World Airways, Inc., Trans World Airlines, Inc. and United Air Lines, Inc. as *amici curiae*, with the consent of both parties.

The case was brought by Griggs, a neighboring landowner, against the County of Allegheny, as owner and operator of the Greater Pittsburgh Airport. He claimed a taking by the County because of alleged low and frequent flights of aircraft over his property in connection with landings and take-offs at the Airport. Neither the airlines nor other airport users were made defendants. However, some of the airlines that use the Airport are defendants, along with the County, in other suits that are still pending, which were brought by petitioner Griggs and other neigh-

boring landowners for (1) injunctive relief against the County and all the commercial airlines, and (2) for damages for a "taking". *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955); 393 Pa. 120, 142 A. 2d 187 (1958). It was because the Supreme Court of Pennsylvania in the *Gardner* case had refused to determine the claim for a taking against the County, on the ground that the proper procedure to recover such damages from the County was under the Pennsylvania statute governing eminent domain, that the present action was begun; and the pending equity proceedings against the airlines and the County in the *Gardner* case were stayed until completion of these eminent domain proceedings against the County. 393 Pa. at 130, 142 A. 2d at 193.

The three Viewers appointed in this case by the Court of Common Pleas of Allegheny County found that the County had condemned or appropriated a "superterranean easement" over Griggs' property and awarded him \$12,690 in damages. (R. 37)* In doing so they found as facts that:

"30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.

"31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.

"32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off." (R. 34, 49).

The Court of Common Pleas sustained the award (R. 75), but the Supreme Court of Pennsylvania reversed (R. 80), with two of the Justices dissenting (R. 88). *Griggs v. County of Allegheny*, 402 Pa. 411; 168 A. 2d 123 (1961).

* "R." is the form of reference used to pages in the Transcript of Record which was filed by petitioner.

In holding the County of Allegheny not liable for a taking, the majority commented (R. 86) that:

"... it would seem that he [the plaintiff] should look for relief to the owners or operators of the aircraft which have made the complained of flights through the air space above his land."

To this the dissenting Justices replied (R. 96):

"... under the facts herein this position is legally unsound and realistically impossible."

A majority of the Supreme Court of Pennsylvania have thus indicated that they are prepared to hold the airport users liable to plaintiff. One effect of such a decision would be that even though commercial airlines are invited, and, as we shall see, required, to use particular airports and runways, and even though they do so in the manner required by Federal law as well as by the necessities of safe operation, they would nevertheless be held liable to adjoining landowners whenever take-offs and landings necessarily and unavoidably were low enough to cause damage that would constitute a taking of the landowners' property under the principles stated in *United States v. Causby*, 328 U. S. 256 (1946).*

* Technically, since airlines here have no right of eminent domain, any action against them would lie in tort, such as trespass or nuisance, rather than in an action for a taking such as might lie against a governmental agency.

We are assuming, only for the purposes of this brief, that plaintiff satisfied the requirements for recovery against someone as set forth in the *Causby* opinion. It may be observed, however, that the evidence introduced by plaintiff is scant, very general, and inevitably inaccurate as to the altitudes, courses and frequencies of flights of aircraft. Also it may be questioned whether noise "comparable to that of a noisy factory" or "riveting machine or steam hammer" (R. 33) that emanates from a lawful activity is actionable. The defendant, relying on its legal position that plaintiff had not sustained his burden of proof (R. 61), introduced no evidence at all.

Such a result not only would be unfair to the land-owners, for reasons set forth in petitioner's brief, but (1) would be incompatible with the national policy of encouraging and fostering an air transportation system adapted to the "needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." (Federal Aviation Act, §102(a); 72 Stat. 740; 49 U. S. C. §1302(a) (1958)), and (2) would contravene both the commerce and the due process clauses of the United States Constitution by subjecting the airlines to liability for doing what Federal law compels them to do in an area preempted by the Federal Government.

Since the impact of the decision below will not be limited to the Greater Pittsburgh Airport, the questions here raised are of vital importance to the airlines, and indeed to the national air transportation system.

THE FACTS AS TO AIRPORT OPERATION.

The basis for the airlines' position will appear from a brief description of the manner in which public airports, including the Greater Pittsburgh Airport, are constructed and operated.

The Airport is Located by the Community Subject to Federal Approval.

No community can receive the benefit of air transportation service unless it provides an airport. The airport is customarily built by a public agency, which possesses the power of eminent domain. The public authority responsible for the airport decides where it will be built, what runways will be constructed, their direction and length, and what land or avigation easements will be acquired. In such matters the airlines customarily have neither the

opportunity to take the initiative nor any decisive, or even substantial, voice.

The Federal Government, in furtherance of the national air transportation policy, also has a direct interest in the location and adequacy of airports. The Greater Pittsburgh Airport, like many other public airports, was financed in part by the Federal Government. Such part is normally 50%. 60 Stat. 175 (1946), as amended; 49 U. S. C. 1109 (1958). This means that the airport plans must be approved by the Federal Aviation Agency. 64 Stat. 1263 (1950), as amended; 49 U. S. C. §1108 (1958). See 14 C. F. R. Part 550 (1961).

Thus, the geographical relationship of the Greater Pittsburgh Airport and its runways to plaintiff's property was determined by the County with the approval of the Federal Government.

By its Grant Agreement the County Assumed Responsibility for Land or Airspace Acquisitions Outside the Bounds of the Airport.

The Grant Agreement, dated September 21, 1948, between the Administrator of Civil Aeronautics* and the County of Allegheny provided in part as follows (R. 104):

“(i) Insofar as is within its powers and reasonably possible, the Sponsor [the County] will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of

* Under the Civil Aeronautics Act of 1938 (c. 601, 52 Stat. 977), an Administrator of Civil Aeronautics and the Civil Aeronautics Board were responsible for air safety. Under the Federal Aviation Act of 1958 (72 Stat. 752, as amended; 49 U. S. C. §§1301-1542 (1958), as amended), the Federal Aviation Agency (“FAA”) was established to take over the responsibility for air safety.

aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods." (Emphasis supplied)

Both the Federal Government and the County of Allegheny were thus aware, thirteen years ago, that easements or other interests in land or airspace outside of the boundaries of the airport might have to be acquired to prevent the usefulness of the airport from being limited. The County of Allegheny expressly assumed responsibility for such acquisitions. It was a part of the price the County was willing to pay in order to provide adequate air transportation service for the important and populous area which it represented. (For the airlines' participation in such cost, see page 18, *infra*.) To the extent, if any, that a right of action for damages, or an injunction, inheres in neighboring landowners because of annoyance from flights conducted as required by law, the usefulness of the airport is limited by inconsistent land uses which the County bound itself to eliminate.

Airlines Certificated to Pittsburgh Must Use This Airport.

The airlines operate under Federal certificates of public convenience and necessity, which specify the cities that must be served. No interstate commercial air transportation can be provided without such a certificate. Once a certificate is granted to an airline it must render "safe and adequate service". Federal Aviation Act of 1958, §404(a); 72 Stat. 760; 49 U. S. C. §1374(a) (1958) (emphasis supplied). See *Capital Airlines, Inc. v. Civil Aeronautics Bd.*, 281 F. 2d 48 (D. C. Cir. 1960); *Fort Worth Investigation*, Supplemental CAB Opinion and Order (Sept. 14, 1960) 1A CCH Av. L. Rep. ¶21,060 (where the Board expressly ordered that

jet service be provided for Fort Worth). And a certificated airline is forbidden to abandon "any route or part thereof" without the permission of the Civil Aeronautics Board. Federal Aviation Act of 1958, §401(j); 72 Stat. 754; 49 U. S. C. §1371(j) (1958). See *Service in New England States Case*, 11 C. A. B. 156, 175 (1950). Nor is this all. For example, the Greater Pittsburgh Airport is the terminal point for the Pittsburgh metropolitan area and its environs for the receiving and dispatching of United States air mail. Mail transportation is an additional service which the airlines are under a federal obligation to perform when so authorized by their certificates. Federal Aviation Act of 1958, §401(1); 72 Stat. 754; 49 U. S. C. 1371(1) (1958). For a multitude of reasons, the certificated airlines must render "safe and adequate service" to the community at the airport and on the runways provided by it.

The County Agreed That This Airport Would be Suitable for the Airlines' Use.

The airport operators and airlines enter into agreements whereby the airlines pay user charges, such as landing fees and rentals, for the use of the airport and its facilities. The airport agrees that the facilities will be appropriate for the airlines to use. Such agreements at Greater Pittsburgh Airport were uniform (R. 16). Each contained an article in which the County agreed that "in consideration of payments hereunder . . . Airline shall peaceably have and enjoy the premises herein granted and all the rights and privileges of the airport, its appurtenances and facilities granted herein." An airline could not peaceably enjoy the rights, privileges and facilities of the Airport if, as here, in the normal, lawful, and necessary course of operations, that very usage subjected it to injunctions or damages by reason of the Airport's failure to have obtained the necessary aviation easements.

The Flight of Aircraft, Especially in and out of a Major Airport, is Regulated in Detail by the Federal Government.

Air traffic to and from such major airports as Pittsburgh is controlled in detail by the Federal Government. While aircraft are aloft, and as they come to the airport, they must follow courses and use runways prescribed by the FAA tower operators, whose determinations are of course, in turn, largely dictated by weather and traffic conditions. Similarly, aircraft use a particular runway, and take off or land, only with the permission and in accordance with the instructions of the tower operators. Holding patterns and the paths of approach and departure are prescribed by Federal rule. All of these tower instructions and rules are designed to insure safety and efficiency of flight.* See generally the Air Traffic Rules, 14 C. F. R. Part 60 (1961).

The Aircraft Themselves, and even Aircraft Parts, Must be Approved by the FAA

The FAA also licenses the type of aircraft to be employed. See 14 C. F. R. Part 1 (1961). It prescribes

* The 1958 Federal Aviation Act also authorized the Administrator to prescribe air traffic rules for, *inter alia*, "the protection of persons and property on the ground." §307(c), 72 Stat. 749, 49 U. S. C. §1348(c) (1958). There are indications in the congressional history that it was the understanding of the congressmen responsible for the 1958 Act, and of the Congress that enacted it, that this clause in Section 307(c) gave the Administrator power to act to reduce the noise annoyance of flights. See House Committee on Interstate and Foreign Commerce, *Hearings Before a Subcommittee on the Federal Aviation Act (H. R. 12616)*, 85th Cong., 2d Sess., 267-69 (testimony of Representative Flynt), 325 (testimony of Mr. Delos Rentzel, former CAA Administrator and CAB Chairman) (1958). The Annual Reports of the FAA (1959, p. 18; 1960, p. 33) show how it has embarked since 1958 upon its program to deal with the noise problem. The FAA has just issued an amendment to 14 C. F. R. §60.18, applicable to all air traffic in the vicinity of airports with control towers, one purpose of which is to alleviate the airport noise problem. 26 Fed. Reg. 9069 (Sept. 27, 1961).

standards and issues certificates with respect to the manufacture, servicing and in-flight operation of aircraft and aircraft parts and supplies. For example, noise suppressors (now in general use on commercial jets in this country) may not be used without FAA approval. 14 C. F. R. Parts 4b, 13, 18 (1961). No plane may fly without an airworthiness certificate and each plane must comply with aircraft operating limitations prescribed for that specific aircraft. 14 C. F. R. §43.10 (1961). The weight of each commercial plane, on each flight, must not exceed an authorized maximum take-off weight and an authorized maximum landing weight. 14 C. F. R. §43.11 (1961).

In the present case the findings were that the flights over plaintiff's property were sufficiently disturbing to be actionable under the *Causby* doctrine, even though no flights were in violation of any regulations of the Civil Aeronautics Administration or lower than necessary for a safe landing or a safe taking off. (Findings Nos. 30-32, quoted in full at page 2, *supra*)

This means that lawful flights along the paths required as a result of the direction of the runways and the FAA regulations and instructions could not have avoided interfering with plaintiff's property. Such interference could have been avoided only by action over which the airlines using the airport had no control. The airport could have been closed down, hardly an action which would have been in the best interests of Pittsburgh or the County of Allegheny (or the public generally) or one which would even have been considered by them. The runway in question could have been closed by the airport; but the effect of this would have been to transfer the interference to other adjacent landowners or to close the airport for substantial

periods of time, whenever the wind direction required use of that runway. Due to the speed of flight and the close interrelation among airports on the same routes, any such intermittent closure would, of course, have made coordinated scheduling impossible and interfered with effective service. The national interest would not permit such a situation.

Transportation, whether it be by air, rail or road, produces some annoyance and inconvenience to the public, but the welfare of the country is dependent upon transportation. In the case of transportation by air, the needs of domestic and foreign commerce, as well as of the national defense,* have produced modern, more powerful, faster, and noisier planes; but, for the reasons explained above, airlines have no choice other than to fly such planes to and from the airports provided by the localities and in the manner required by the Federal Government.

Before turning to our argument, and in order to present the full picture, it should be noted that the commercial air carriers have been trying to do their part towards lessening the noise by promoting the development of quieter equipment and the use of noise suppressors, by the removal or restriction of training flights at urban airports when practicable, by cooperating in the development and observance of less annoying flight patterns, where consistent with safety, and by other means. See testimony of James T. Pyle, Deputy Administrator of the FAA, in Hearings Before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 87th Cong., 1st Sess., April 12, 1961 (as released by the FAA; printed transcript not available); Aviation Week, Sept. 19, 1960, p. 41.

* Under the C. R. A. F. Program four-engine commercial planes are subject to 24 hours call by the government in the event of an emergency.

ARGUMENT.

Assuming as we do for the purposes of this argument that there has been an actionable interference with the property rights of plaintiff, the question presented is whether the liability created is that of the Federal Government, the County of Allegheny or the airport users. It is the position of these *amici curiae* that to impose this liability upon the airport users, as suggested by the Supreme Court of Pennsylvania, would be inequitable, unconstitutional, and wholly impractical.*

As far as we have been able to ascertain, no court has yet held a commercial air carrier liable for damages on any theory in a case such as this where lawful flights were conducted in compliance with Federal regulation. See *Note*, 74 Harv. L. Rev. 1581, 1585 (1961).

On the facts as found here the airlines could not legally or practically avoid flying over plaintiff's property. They were, and are, required by law to serve the Pittsburgh metropolitan area. They must use the only airport which the County provides and which the County has invited them to use. They must use the runway which takes them over plaintiff's land low enough to cause annoyance when FAA (formerly CAA) instructions so require. Thus a combination of County action in providing the airport and runways and of Federal regulations requiring the airlines to serve Pittsburgh and instructing them how to conduct flights to and from Greater Pittsburgh Airport resulted in the flights which interfered with plaintiff's property rights.

* For a similar view see *Note, Airplane Noise: Problem in Tort Law and Federalism*, 74 Harv. L. Rev. 1581, 1587-88 (1961).

These flights were made in full compliance with Federal regulations and at altitudes no lower than necessary for landing and taking off (Findings Nos. 31-32, p. 2, *supra*). There is not the slightest suggestion in the record that the commercial aircraft involved were flown in an erratic, improper or unnecessarily annoying manner.* If the directions of the runways and the limited amount of peripheral land and avigation easements acquired by the owner of the airport, together with the Federal regulations, were such as to make it necessary for aircraft landing or taking off to fly at such a level as to cause annoyance to the owners of adjacent properties, such flying was not the responsibility or fault of the operators of such aircraft. Indeed, they were without power to avoid such flights. For the State of Pennsylvania to hold them responsible for damage to underlying property caused by such lawfully conducted flights would be an arbitrary deprivation of their property without due process of law, as well as an intolerable interference with the operation of the Federal regulatory system in an area preempted under the commerce and supremacy clauses.

Interstate air transportation is obviously a subject requiring uniform control, over which Federal regulation is and necessarily must be "intensive and exclusive". *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 303 (1944) (concurring opinion of Mr. Justice Jackson).** Cf.

* There is one reference in Mr. Griggs' testimony to "jets playing" (R. 25, line 26), but no commercial jets were in operation until 1958, long after the dates of his observations and notes.

** "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. . . . It takes off only by instruction

Bibb v. Navajo Freight Lines, 359 U. S. 520 (1959); *Bethlehem Steel Co. v. New-York Labor Relations Bd.*, 330 U. S. 767 (1947); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

All four criteria by which Congressional intent to preempt state regulation may be inferred, as stated by this Court in *Rice v. Sante Fe Elevator Corp.*, 331 U. S. 218, 230 (1947), are amply met in this field. The scheme of federal regulation of air traffic is so pervasive that no room is left for the States to supplement it; the federal interest is not only overwhelming but inevitable, due to the nature of air traffic, the speed of flight (see *Scientific American*, Dec. 1960, pp. 47-55) and the interrelation with air defense; the object of the Acts of Congress—a safe, modern and efficient national and international system of air transportation—requires exclusive federal control; and, finally, local regulation of air traffic, including such state court rulings as that suggested by the Supreme Court of Pennsylvania, which would hold airport users liable for annoyance caused by necessary flight operations conducted pursuant to Federal law, would be inconsistent with the aforementioned objectives of said Acts. The field of air traffic regulation has been preempted by the Federal Government. *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956) so held (p. 815):

“The federal regulatory system . . . has preempted the field below as well as above 1,000 feet from the ground.”

from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.” 322 U. S. at 303.

But the Supreme Court of Pennsylvania did not consider the effect of federal preemption.*

If state courts were permitted to allow damages or injunctions for flights conducted as required by the Federal regulations, there would be an impossible conflict between state law and Federal statutory policy, with the airlines caught squarely in the middle. *Cf. Farmers Union v. WDAY*, 360 U. S. 525, 535 (1959). The situation resembles that earlier faced by this Court in the case of the railroads, where it said that to allow tort actions against the railroads for disturbances that were necessary and incidental concomitants of proper operations would "bring the operation of railroads to a standstill". *Richards v. Washington Terminal Co.*, 233 U. S. 546, 555 (1914).

The Pennsylvania statute referred to by the court adds no support to its suggestion that airport users be held liable for damage caused by lawful landings and take-offs. That

* *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960), in which a Detroit ordinance limiting the amount of smoke which steamships could emit was held valid, did not involve as intensive or exclusive a system of federal regulation, or a subject matter where nationwide detailed regulation was imperative to the uninterrupted safe flow of commerce. As stated by Mr. Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, *supra*, at page 303:

"... Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

In *Huron* there was no direct conflict because the shipowners could have complied with local law by the installation of a different type of boiler, and still have complied with all federal laws. Furthermore, the imposition of penalties by the City of Detroit did not conflict with the federal regulation and licensing of equipment, while here the very imposition of damages or injunctions against the airlines would conflict with the federal control of air traffic. The airport users were and are directed by the Federal Government to fly through the very airspace, and in the very manner, which the Supreme Court of Pennsylvania has suggested would result in liability under Pennsylvania law.

Act (Pa. Stat. Ann., tit. 2, §1469 (Supp. 1960)) provides that the aircraft owners and pilots, or either of them, shall be liable for damage to persons or properties below "caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom, in accordance with the rules of law applicable to torts on land." But, apart from the fact that this type of statute has not heretofore been understood to deal with damages caused by lawful, normal flights (see pp. 23-26 of petitioner's brief), we are here dealing with an area of conduct that must be free from state regulation. An award of damages against airport users under the facts of the present case for conduct not only permitted but required would constitute a penalty for obedience to federal law. As this Court said in *San Diego Unions v. Garmon*, 359 U. S. 236, 246-47 (1959):

"Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme."

Congress itself has now made it crystal clear that flights such as those in this case (see Findings Nos. 30-32, p. 2, *supra*) are in the public domain. Section 104 of the Federal

Aviation Act of 1958 provides, as did its predecessor acts in substance, that

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 72 Stat. 740; 49 U. S. C. §1304 (1958).

Congress in Section 101(24) of the 1958 Act defined "navigable airspace" to mean

"... airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (Emphasis supplied.) 72 Stat. 737; 49 U. S. C. §1301(24) (1958).*

If aircraft fly no lower than is necessary for safety in taking off and landing, they are flying in space set aside for them by Congress; and when they follow the rules and instructions of the FAA as to runways and flight paths and patterns, they are flying in that space lawfully and properly.

* Petitioner's brief (pages 5, 6, 22, 32) erroneously assumes that navigable airspace does not include the area below 500 feet necessary for taking off and landing. Under the Civil Aeronautics Act of 1938 the minimum safe altitudes of flight were those specified by the Civil Aeronautics Board. The rule that has been in effect since 1945 provides for minimum altitudes of 500 or 1,000 feet "except when necessary for take-off or landing". 14 C. F. R. §60.17 (1961). In a 1954 interpretation, the Board explained that this meant "that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace". Civil Air Regulations, Interpretation 1, 19 Fed. Reg. 4602 (1954) (also printed at 14 C. F. R. §60.17 (1961)). Congress ratified this position by adding the last clause to Section 101(24) of the new Act when the Federal aviation legislation was revised in 1958. See Senate Committee on Interstate and Foreign Commerce, *Text of the Federal Aviation Act of 1958, Showing Changes Proposed to be Made in Existing Law* (July 1, 1958), 85th Cong., 2d Sess., 3.

No state or local law can prohibit flying thus permitted under the Federal statutes (*Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F. 2d 812 (2d Cir. 1956)). For the same reasons such flying cannot constitutionally be penalized by application of the state tort rules of nuisance or trespass.

Assuming, for the purposes of this brief (see footnote on page 3, *supra*), that plaintiff is constitutionally entitled to recompense from someone, the remedy which the Supreme Court of Pennsylvania has suggested would be of little practical value to him. In the instant case, plaintiff has neither attempted to show nor would it be possible for him to show what flights conducted by which carriers caused what interference with the use of his property. As the plaintiff testified, the aircraft here involved included many Air Force planes and private planes in addition to aircraft owned or operated by numerous different commercial carriers (R. 19-25), and there was no evidence or finding with respect to the altitudes, courses, frequencies or other characteristics of the flights of aircraft of one airport user as distinguished from those of all the others. It was for such reasons that the dissenting Justices of the Supreme Court of Pennsylvania thought the alleged right of recovery against the airport users to be illusory (402 Pa. 411, 430; 168 A. 2d 123, 132). If the difficulty in apportioning damages among various airport users led to the conclusion that an injunction against all flying over a landowner's property would be the appropriate remedy, the result would be even more intolerable. It would enable an adjacent property owner to prevent Pittsburgh or any other community from making an effective use of its airport, would place a direct and impossible burden upon interstate commerce, and in blocking proper development of an air transportation sys-

tem would prevent the creation of that fleet of modern commercial aircraft essential to the national defense.

To say that an airline should not be liable in damages or subject to injunctive relief sought where the peaceable enjoyment of property has been interfered with by lawful and necessary flights is not to say, however, that airlines and persons using them do not bear any part of the expense of securing aviation easements necessary to the operation of an airport. At all major airports, the landing fees, rentals and other users' charges which they pay are directly related to the costs of airport operations.

Such damage as plaintiff may have sustained was the result of action taken by the Federal Government and the County of Allegheny. If it resulted, on the facts assumed, in a final definite impairment of value, recompense could be made far more effectively and more appropriately through an award in eminent domain than in actions for trespass or nuisance against airport users. Such an award, furthermore, would in no way confuse the uniform application of Federal regulations or impede the development of air transportation.

The Supreme Court of Pennsylvania was of the view that because the airport operator, the County, never physically occupied plaintiff's land or the air over it, it could not be deemed to have "taken" plaintiff's property. But the concept of "taking" under the Federal Constitution is not so limited. When a dam 25 miles away raised the water level under farm land enough to destroy its usefulness for agriculture, the Government was held liable for a taking. *United States v. Kansas City Ins. Co.*, 339 U. S. 792 (1950). Actual possession by the Government responsible for the destruction of property values is not necessary. "Taking," like other terms of the Constitution, is a

practical concept, to be interpreted in the light of practical considerations. And the same, of course, is true of the "deprivation of property" clause of the Fourteenth Amendment, which applies to the States.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 81

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF AIRPORT OPERATORS COUNCIL, AS
AMICUS CURIAE.

The Interest of Your Amicus

This brief is submitted by the Airport Operators Council, *amicus curiae*, with the permission of both parties. The Airport Operators Council is a non-profit organization

consisting of the various governmental * agencies, authorities, commissions, boards and departments which operate the principal airports in the United States.

AOC member airports serve over 75% of the nation's domestic scheduled airline passengers and almost 100% of its overseas international airline passengers. Its members operate the public airports at such cities as Baltimore, Boston, Chicago, Cleveland, Denver, Honolulu, Houston, Kansas City, Los Angeles, Miami, New York, Oakland, Philadelphia, San Francisco and Seattle. Included herein as Appendix A is a list of Airport Operator Council members, together with the airports which they operate.

Your *amicus* has a vital interest in this litigation because of petitioner's contention that Allegheny County, the owner and operator of the Greater Pittsburgh Airport has, as a matter of Federal constitutional law under the 5th and 14th Amendments

"appropriated without due process of law an easement in the air space above petitioner's property and is liable for the damages sustained under the doctrine of *U.S. v. Causby*, 328 U.S. 256." (Petitioner's brief, p. 35)

It is to refute this contention as well as to show that the constitutional issues which petitioner raises should not be decided by this Court, that the AOC, as the organization

* The only non-governmental members are Lockheed Air Terminal, Inc., a private corporation which operates the Burbank, California, airport; and the Airlines National Terminal Service Company, Inc., a private corporation which operates the Detroit-Willow Run Airport, Detroit, Michigan. Additionally, the United States government operates Washington National Airport; and we have several non-United States members as well. None of the members mentioned in this footnote, however, have participated in this brief or in the proceedings leading to its authorization.

which represents the interests of the nation's airport operators, respectfully submits this brief.

The Decision Below

Petitioner, a property owner in the vicinity of the Greater Pittsburgh Airport, together with four other landowners, commenced actions in equity against certain airlines using the Airport and the County of Allegheny, the owner and operator of the Airport. The complaints alleged continuing unlawful and dangerous trespasses by aircraft over the properties of the respective plaintiffs, as well as "takings" of these properties.

The Pennsylvania Supreme Court, in 402 Pa. 411, 168 A. 2d 123 (1961), vacated an award by a Board of Viewers against Allegheny County in the amount of \$12,690 as petitioner's damages for a "taking" of his property allegedly occasioned by the County's operation of the Airport.

The court's holding was placed on the ground that the County could not be the efficient legal cause of a "taking" resulting from the flights of planes, since the County exercised no control over any of the aircraft of which complaint was made. In so ruling, the court rejected the County's argument that the air space in question was part of the public domain through which Congress had granted a free right of transit. The court was of the opinion that the Civil Aeronautics Authority had not prescribed minimum safe altitudes of flight for aircraft while landing and taking-off.

This Court granted certiorari in 366 U.S. 943 (1961).

Petitioner's Contentions Before This Court

Petitioner asserts that the decision of the Pennsylvania Supreme Court has deprived him of his property without

due process of law in violation of the 5th and 14th Amendments to the United States Constitution. He asks this Court to reverse that decision on the following three grounds, each of which is a separate point in his brief:

- 1) a reversal is required under *United States v. Causby*, 328 U.S. 256 (1946);
- 2) the remedy indicated by the Pennsylvania Supreme Court for the damages petitioner sustained is erroneous as a matter of Pennsylvania law, and, in any event, is illusory; and
- 3) there is no remedy by way of injunctive relief by a State court since it would violate Federal law.

Your *amicus* will argue that each of petitioner's three grounds for urging a reversal of the Pennsylvania Supreme Court's decision is erroneous.

Summary of Argument

Our first two points will demonstrate that the constitutional questions which petitioner raises should not be decided by this Court. Since the opinion below holds that petitioner possesses other remedies under State law to vindicate his alleged rights and, in addition, it is clear that petitioner has Federal remedies, *Point I* argues that this Court cannot at this stage of the proceedings hold that the Commonwealth of Pennsylvania, acting through its courts, has denied petitioner his 14th Amendment due process rights.

Moreover, since a decision on the constitutional questions petitioner raises may ultimately be unnecessary after petitioner exhausts his remedies under State and Federal law, *Point II* contends that this Court should not now pass upon these constitutional questions.

Point III shows that far from supporting petitioner's contention that it is the airport operator who is liable for any alleged "taking" of his property, this Court's decision in *United States v. Causby*, 328 U.S. 256 (1946) indicates that if anyone at all is liable it is not the airport operator but rather the operator of the offending aircraft or the Federal government which provides the highways in the air.

Lastly, *Point IV* argues that the flights in question are immunized from liability by the applicable Federal statutory and administrative scheme of air traffic control since they are within the nation's navigable air space through which Congress has declared a free right of transit to exist comparable to the public easement of navigation in navigable waters. Accordingly, the County cannot be held liable for the damages allegedly caused petitioner by those flights. If it is contended that the Federal regulatory scheme resulted in a taking of the petitioner's property that is a question which does not involve the County but is one solely between petitioner and the United States.

Point I

The Commonwealth of Pennsylvania, Acting Through Its Courts, Has Not Taken Petitioner's Property in Violation of the Constitution's Due Process Clause Since the Pennsylvania Supreme Court Has Indicated That Petitioner Has Other Remedies Available Under State Law to Vindicate His Alleged Rights, and it is Clear That Petitioner Has Additional Remedies Under Federal Law.

The sole basis, under the Constitution, for petitioner to be before this Court is the 14th Amendment's provision that no State shall

"... deprive any person of life, liberty or property without due process of law."

Petitioner contends that the Commonwealth of Pennsylvania, acting through its highest court, has violated this provision of the 14th Amendment (and also the 5th Amendment, as incorporated into the 14th Amendment) by "taking" his property without compensation and hence without due process. We cannot agree.

The Pennsylvania Supreme Court in the very decision which petitioner asks this Court to reverse, after referring to *United States v. Causby*, 328 U.S. 256 (1946), held that petitioner

"should look for relief to the owners or operators which have made the complained of flights through the airspace above his land".

The Pennsylvania Supreme Court also noted that

"such relief is contemplated by Section 403 of the Aeronautical Code of May 25, 1933, P.L. 1001, 2 P.S. § 1469"

which statute the Court proceeded to quote in full.

This Court has repeatedly held that

"The due process clause does not guarantee to the citizen any particular form or method of procedure."
Dehany v. Rogers, 281 U.S. 362, 369 (1930).

See also *Bauman v. Ross*, 167 U.S. 548 (1897); *A. Backus & Sons v. Fort Street Union Depot Co.*, 169 U.S. 569 (1898); *McCoy v. Union Elevated R'way Co.*, 247 U.S. 354 (1918).

Thus, petitioner will not be denied due process if fair compensation is made available to him under state law.

As Mr. Justice Stone stated for the Court in *Dohany v. Rogers, supra*, (p. 366):

"We cannot assume that under the procedure prescribed by the State for the taking of appellant's land he will not be entitled to receive or will in fact be denied the just compensation which the Constitution guarantees."

See also opinion of Mr. Justice Frankfurter, dissenting in *Walker v. Hutchinson*, 352 U.S. 112 (1956).

In view of the express holding that plaintiff has a remedy available to him under State law, it is impossible to see how petitioner under the above cases can argue to this Court that the Commonwealth of Pennsylvania has violated his Federal constitutional right to due process by denying only the particular remedy he seeks in this action.

Petitioner evidently realizes the weakness of his position, since he goes on to argue (a) that the Pennsylvania Supreme Court misconstrued the Pennsylvania statute on which it relied, (b) that the remedy which the Pennsylvania Supreme Court has held petitioner possesses is, in reality, illusory, and (c) that a state court injunction against the flight of commercial aircraft would violate Federal law. By making these arguments, petitioner, in effect, concedes that the opinion below, at least on its face, cannot be said to violate due process. Petitioner's arguments of erroneous statutory construction, illusoriness of a state court remedy in tort, and violation of Federal law are each without merit.

Petitioner asserts that:

"The section of the Pennsylvania statute suggested by the Pennsylvania Supreme Court does not authorize action for damages to property caused in the regular movement of air traffic." (Petitioner's brief, p. 23)

Petitioner's contention flies in the face of this Court's well settled rule that the interpretation or meaning given to state statutes by a state's highest court will not be reviewed or reconsidered by this Court. In *Brinkerhoff-Paris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680 (1930), Justice Brandeis set forth this familiar rule:

"the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state."

and

"the mere fact that a state court has rendered an erroneous decision on a question of law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court."

See also *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959); *Neblett v. Carpenter*, 305 U.S. 297 (1938); *Iowa Central Railway Co. v. Iowa*, 160 U.S. 389 (1896). Accordingly, under Pennsylvania law, as interpreted by that Commonwealth's highest court, it is clear that petitioner has, as that court ruled, a remedy against

"the operators of the aircraft which have made the complained of flights through the air space above his land." 402 Pa. 411, 168 A. 2d 123 (1961).

Petitioner contends that the remedy given him by the Pennsylvania Supreme Court is illusory even though he has not tested or exhausted this remedy. Hence at the very best his contention that the remedy is illusory is mere speculation. In *Rescue Army v. Los Angeles*, 331 U.S. 549 (1947) and *Parker v. County of Los Angeles*, 338 U.S. 327 (1949) this Court refused to review asserted constitutional

questions upon finding that petitioners in those cases could yet seek remedies in the State courts. In *Parker v. County of Los Angeles, supra*, this Court said (p. 332):

"If their claims are recognized by the California courts, petitioners would of course have no basis for asserting denial of a Federal right. It will be time enough for the petitioners to urge denial of a Federal right after the State courts have definitively denied their claims under State law. Due regard for our Federal system requires that this court stay its hand until the opportunities afforded by State courts have exhausted claims of litigants under State law."

As a matter of law, then, petitioner cannot contend that his State remedies are illusory until he has exhausted them. But even factually it is clear that the State remedies still available are not illusory. Petitioner is, in effect, arguing that Allegheny County should be liable to him as a matter of constitutional law because the proof required to sustain tort actions which he has brought and which are still pending against the County as well as against the airlines may be inconvenient for him to secure. But difficulty in proving a cause of action in tort has never been equated with a denial of due process.

This is aside from the fact that the proof which this petitioner himself has submitted to the Board of Viewers in the instant condemnation action certainly shows that a tort remedy for trespass is meaningful and far from illusory. A review of petitioner's own proof before the Board of Viewers destroys his argument as to the illusory quality of a state remedy in tort.* We do not mean to indi-

* In fact, the Record before this Court indicates that petitioner had no difficulty in identifying the airplanes that flew over his property (R. 20-25). The complete Record, the one before the Supreme Court of Penn-

cate that the court below was prepared to hold that the airlines are liable to petitioner. What the court said is that the County is not liable, and that if petitioner wishes relief, he should sue the airlines and see whether he can establish a case against them. It is important to note that the County did not introduce any evidence of its own to rebut petitioner's proof of monetary loss. Instead, the County chose to rely on its legal position.

What we mean to emphasize is that the state courts have great discretion and wide power to award a litigant adequate relief, whatever the form of action, provided he proves his case. Certainly the courts have in the past met and solved more difficult problems of measuring and allocating damages among joint or several tort feorsors.

Furthermore, in *City of Newark, et al. v. Eastern Air Lines, Inc., et al.*, 159 F. Supp. 750 (D.N.J. 1958), a Federal district court held in a closely analogous case that there can be a remedy in trespass against airlines and did not consider that remedy illusory.

At all events, petitioner is in no position under the above cases to allege the illusory quality of a remedy given him in good faith by the highest court of his State, before he has tried it in the lawsuit which he still has pending against the airlines and the County.

A basic fallacy inherent in petitioner's entire argument arises from an ambiguous use of the word "taking". Petitioner contends his property has been "taken" and that therefore this case is like a proceeding in eminent domain. Since, contends petitioner, he has not been paid compensation under the Commonwealth's eminent domain procedure, he has been denied due process. But his property has not

sylvania, indicates further, *inter alia*, that the identity of the planes which used the northeast runway could be ascertained by comparing the schedules of flight and the wind records which are maintained by the Weather Bureau (R. 107-108).

been taken by eminent domain and the 14th Amendment does not require that state courts treat somewhat analogous situations as if they were identical. If there has been a taking, such taking is in the nature of an interference with the use and enjoyment of his property by flights of aircraft. Such a taking may be analogous to some extent with a taking by eminent domain, but it is also analogous to the interference with the use and enjoyment of property which is represented by the common law terms of "trespass" and "nuisance". It cannot be said that the Pennsylvania Supreme Court was arbitrary in holding that the mode of procedure to recover compensation for such an interference should be by a tort suit rather than one in eminent domain.

If the present controversy is left in the field of tort law, and not placed in that of constitutional taking, then there is scope, as there ought to be, for the tort doctrines of active and passive tortfeasors, contribution and contractual indemnification which can then come into play as between the alleged tortfeasors. Petitioner's position would deny the airport operator the contemporaneous right to have these normal protections.

In *Causby, supra*, upon which petitioner relies, this Court stated that the taking occasioned by the flights of government aircraft resulted from repeated and continued *trespasses*. If this Court were now to hold that petitioner's 14th Amendment rights have been violated, it will, in reality, be holding that the 14th Amendment requires that petitioner's remedy is properly brought for compensation in eminent domain against a party which has no control over the flights of aircraft rather than for compensation against the actual operators of the aircraft causing the disturbance for wrongful trespass or against the Federal Government

which provides the highways in the air which are used by the aircraft.

The *Causby* decision is itself authority to the contrary (see *Point III* below), and the 14th Amendment neither turns a tort into a constitutional question, nor prescribes particular procedural forms to be followed in state litigation. Furthermore, constitutional due process is not violated by requiring a property owner to look for compensation to a non-governmental person taking or interfering with his property under authority or permission of the State or Federal governments. *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641 (1890); *Strickley v. Highland Boy Gold Min. Co.*, 200 U.S. 527 (1906).

Except for the immunization we believe Congress has conferred on flights through the nation's navigable airspace (see *Point IV* below), there is no doubt that the commercial airlines can be held liable in damages for their torts without interfering with the Federal regulatory scheme of air traffic control or otherwise violating Federal statutory or constitutional law. Unlike the overwhelming majority of airport operators who are public agencies, the commercial airlines, though regulated by the Federal Government, are private profit-making corporations and if in the course of their operations they commit torts, it cannot seriously be asserted that placing monetary liability on them imposes any greater burden than that incurred when they pay their suppliers for materials or their employees for services. In short, the cost of such burden is as much an economic incident of airline flights as the cost of the fuel consumed on those flights.

It should be borne in mind that it is the airlines and not the airport operators who, subject to FAA safety criteria, choose the kind and type of aircraft to be flown. If the airlines for their own commercial profit choose to use

heavier and noisier aircraft than that in use five, ten or fifteen years ago, no reason exists why the airport operator and not the airlines should be liable for whatever damages are incurred by the use of such equipment. Note in this connection *Highland Park Inc. v. United States*, 161 F. Supp. 597 (1958), where the Court of Claims held that no "taking" of the claimant's property occurred when the United States flew over the property conventional piston aircraft but a "taking" did occur when the Government discontinued the use of piston type aircraft, substituting in their place much noisier jet aircraft.

Furthermore, while it is true that the airlines have to obey Federal flight rules and Federally imposed flight patterns, it is most emphatically not true that they have no control over the altitudes at which their planes fly over petitioner's property. The wide variation in altitude found by the Board of Viewers in the present case demonstrates this.*

The fact is that the airlines have control,—again within applicable FAA safety criteria—over the altitudes at which their aircraft fly. They exercise their control initially when they determine how much money to spend for research into the flight characteristics of potential aircraft including research in noise suppressor devices. They exercise their control when they determine which of the available types of aircraft they are going to purchase. They continually exercise their control in their day-to-day flight operations. It is well known that aircraft can rise much more rapidly if they have lighter loads and while under

* The Board of Viewers accepted petitioner's proposed Finding of Fact that planes flew over his property from 30 to 300 feet on take-offs and from 53 to 153 feet on landing. The Board of Viewers also inconsistently adopted the proposed Finding of Fact made by the County that aircraft flew over petitioner's property at indeterminate altitudes (R. 34, 48, 53).

given circumstances this might mean that an airline might have to reduce its load to avoid liability in tort and thus suffer an economic penalty, no reason exists why the airport operator should be held liable as a matter of constitutional law because an airline decides in its own economic self-interest to use heavy loads and thus ascend over given property at lower altitudes. - Also, we should observe that while the airlines do operate under Federal certificates, they have them only because they wanted them and applied for them in furtherance of their interests. It is to be assumed they would have no great difficulty in having them cancelled if they prove hardship.

Petitioner finally contends that since he could not obtain or determine damages, only an injunction could protect his rights. But petitioner contends that such relief, if granted against the airlines by a state court, would violate Federal law under the authority of *Allegheny Airlines, et al. v. Village of Cedarhurst*, 238 F. 2d 812 (2 Cir. 1956). However that might be, the fact is that it is petitioner who has brought an action for injunctive relief in the Pennsylvania courts instead of the Federal courts and that action is still pending. It is difficult to understand how he can now ask this Court to decide that the Pennsylvania courts in which he has brought that action lack the power to give him the relief he is seeking or other alternate adequate relief. Moreover, it cannot be contended that the *Cedarhurst* decision, *supra*, bars a Federal court from granting petitioner injunctive relief. In addition, there are available to petitioner Federal administrative remedies under which he may obtain the essence of injunctive relief through section 1002 of the Federal Aviation Act of 1958 (72 Stat. 788, 49 U.S.C. 1482). Petitioner has not as yet availed himself of this type of relief.

There can be no doubt that the Federal administrative

agencies can give petitioner whatever relief they deem is warranted by virtue of their plenary jurisdiction over air traffic rules and flight patterns. See, in this connection, *Allegheny Airlines, et al. v. Village of Cedarhurst et al.*, *supra*; *City of Newark, et al. v. Eastern Airlines, Inc. et al.*, *supra*, and *Point IV* hereof.

In the *Newark* case, an action was brought for injunctive relief and damages by five municipal and six individual plaintiffs against seven airlines using Newark Airport. The Federal District Court dismissed that portion of the complaint seeking an injunction on the ground that plaintiffs should first have sought relief before the appropriate Federal administrative agency. The court observed that the Civil Aeronautics Act of 1938 (now the Federal Aviation Act of 1958) vests in the appropriate Federal regulatory agency (p. 758):

“ * * * a comprehensive authority to regulate by rule and order every aspect of interstate air commerce, and specifically empowers it to prescribe and revise from time to time: ‘Air traffic rules governing the flight of, and for the navigation, * * * of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles.’ ” (Emphasis, the Court’s)

The court then noted that such regulations may be amended and pointed out (p. 759):

“The Civil Aeronautics Board, fully aware of the broad powers vested in it, has by regulation, § 301.40, 14 C.F.R., reserved to ‘any interested person’ the right to ‘petition the Board for the issuance, amendment, modification, or rescission of any Civil Air Regulation.’

The pertinent regulations § 301.41, et seq., prescribe a simple and flexible procedure which may be followed by a petitioner. The rule, as we construe it, reserves to any person whose interests are adversely affected by any regulation, the right to petition for relief."

The court went on to dismiss that portion of the complaint seeking injunctive relief, saying (p. 759):

"If, on petition of the plaintiffs and after investigation and hearing, the Civil Aeronautics Board amends either the present regulations or the operations specifications, or both, a further resort to this Court will be clearly unnecessary."

Certainly, with this type of relief still available to petitioner, this Court cannot hold as a matter of law that he has been deprived of his due process rights, at least at this stage of the proceedings.

It is significant that since the *Newark* decision, the new Federal Aviation Agency (which largely absorbed the functions of the old Civil Aeronautics Administrator and certain rule-making powers of the Civil Aeronautics Board) has issued so-called anti-noise traffic patterns for specific airports. Thus, on September 3, 1960, the Federal Aviation Agency issued new Air Traffic Rules for New York International Airport, the preamble to which states in part that

"A major purpose of this regulation is to reduce the aircraft noise disturbance to persons on the ground
• • •". 25 Fed. Reg. 8538 (1960).

The preamble observes that

"The most direct solutions presently feasible include rearrangement of local traffic flow, use of prescribed

preferential runways and traffic rules to establish the maximum altitudes of flight consistent with safe landings and take-offs." 25 Fed. Reg. 8538 (1960).

In addition, the Rules state that the FAA currently 'requires' certain types of aircraft to "be equipped with engine noise suppressors" which effect a substantial reduction of engine noise.

Your *amicus* does not know what the precise situation is at the Greater Pittsburgh Airport, but wishes to point out to this Court that in the new rules relating to New York International Airport, the Federal Aviation Agency made such comments as the following:

"Prohibition of the use of these runways is a measure designed to reduce aircraft noise and the action was taken only after due consideration of safety requirements. The Agency realizes that under certain conditions, it may be necessary to utilize these runways; therefore, this rule provides the New York International Airport Traffic Control Tower the necessary flexibility to authorize deviations when necessary. However it is emphasized that such authority will be used sparingly." 25 Fed. Reg. 8539 (1960).

and

"In addition to the benefits accruing to safety, the requirement that small, less noisy aircraft operate in the lower strata of airspace and the larger and more noisy aircraft at the higher altitudes will serve to relieve the problems resulting from aircraft noise. * * * 25 Fed. Reg. 8539 (1960).

Similar "Airport Traffic Area Rules" for the Los Angeles International Airport had previously been issued by the Federal Aviation Agency. 25 Fed. Reg. 1764 (1960). In issuing the Los Angeles Air Traffic Rules, the FAA pointed out:

"These operating rules were developed in order to enhance the safety of all aircraft operations in this area and to provide for the protection of persons and property on the ground." 25 Fed. Reg. 1764 (1960).

The issuance of these air traffic patterns and rules by the FAA is in complete accord with the decision in the *Newark* case. It demonstrates that it is entirely possible for petitioner to get adequate relief administratively. As a matter of fact, the FAA can impose, in terms of decibels, or otherwise, ceilings on the amount of noise it will permit aircraft to make when flying over property in the course of their operations. It must be emphasized that petitioner is afforded judicial review of these administrative proceedings. See §1006 of the Federal Aviation Act [49 U.S.C. §1486 (a)] and *Schwab v. Quesada*, 284 F. 2d 140 (3 Cir. 1960).

To conclude: Despite the fact that the Pennsylvania Supreme Court pointed out that petitioner has a remedy under state law and despite the fact that petitioner has an additional remedy under Federal law, petitioner nevertheless asks this Court to hold at this stage of the proceedings that the decision below violates his 14th Amendment due process rights. We respectfully submit that under these circumstances this Court should not hold at this time that the Commonwealth of Pennsylvania has denied petitioner his 14th Amendment due process rights.

Point II

A Decision on the Constitutional Questions Petitioner Is Now Raising May Ultimately Be Unnecessary After Petitioner Exhausts Other Remedies Available To Him Under State and Federal Law. Accordingly, This Court Should Not Now Pass Upon the Constitutional Issues Petitioner Raises.

On innumerable occasions this Court has held that it will rule on important questions of constitutional law only if there is no other way in which the Court can decide the case without determining the constitutional question. This rule is based upon broad considerations of the appropriate exercise of judicial power. As stated in *Parker v. Los Angeles County*, 338 U.S. 327, 333 (1949), Mr. Justice Frankfurter, speaking for the Court,

"The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

Accord, Clay v. Sun Insurance Office, 363 U.S. 207 (1960); *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955); *Alma Motor Corp. v. Timken Detroit Axle Co.*, 329 U.S. 129 (1946); *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316 (1945); cf., *Barr v. Mateo*, 355 U.S. 171 (1957). The constitutional question need not now be decided in this case and decision may ultimately be unnecessary since to quote from *Parker v. Los Angeles County*, *supra*,

"If their claims are recognized by California courts petitioners would of course have no basis for asserting denial of a Federal right." (p. 332).

The present case is analogous to those cases where this Court has refused to decide federal questions concerning state court decisions or state statutes where the state courts have not fully or finally interpreted the state law involved; See, *Meridian v. Southern Bell Telephone & Teleg. Co.*, 358 U.S. 639 (1959); *Spector Motor Service v. McLaughlin*, 323 U.S. 101 (1944); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); *Government & C.E.O.C., CIO v. Windsor*, 353 U.S. 364 (1957); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

As the record now stands, petitioner is requesting this Court to do precisely what it has continuously held it should not do. If petitioner resorts to the other remedies noted in *Point I*, above, which are presently available to him including prosecuting to completion in the Pennsylvania courts his ~~pending~~ actions in tort against the airlines and the County, a decision on the constitutional questions he now raises might never become necessary. Accordingly, this Court should not pass upon them at this time.

Point III

Far From Supporting Petitioner's Argument That It is the Airport Operator Who Is Liable for Any Alleged "Taking" of His Property, This Court's Decision in Causby Indicates that If There Is Any Liability, It Is Not Imposed on the Airport Operator.

If, in spite of the arguments to the contrary, this Court feels that the constitutional issues raised by petitioner should now be decided, we believe that the decision below is correct and should be affirmed. Petitioner's principal reliance in seeking a reversal of that decision is *United*

States v. Causby, 328 U.S. 256 (1946). Far from supporting petitioner this Court's decision in *Causby* destroys his argument that it is the airport operator who is liable for any alleged "taking" of his property.

While acknowledging the similarity between his own situation and that in *Causby*, petitioner has misstated and deemphasized the crucial facts of *Causby* and has misconstrued its rationale. Thus, petitioner states that:

"In *Causby*, supra, the United States operated both the airport and the aircraft * * *." (Petitioner's brief, p. 15).

The fact is that in *Causby*, the United States did not operate the airport.

The Court of Claims specifically found that:

"2. The Greensboro-High Point Municipal Airport Authority operates an airport covering a considerable acreage of land, under and by virtue of an enabling Act, of the North Carolina Legislature, passed in 1941 * * *; *Causby v. United States*, 60 F. Supp. 751, 752 (Cl. Cl. 1945).

The lease between the Greensboro-High Point Airport Authority and the United States included a clause which reserved to the Airport Authority the right to contract with any other person for the use of the Airport.

"13. Nothing contained herein shall prevent Lessor from entering into a contract or lease with any other person, firm or corporation for the use of the Airport, or any part thereof, or for any concession thereon, provided said contracts or leases shall be made subject to the terms of this lease." (R. 314).

The record before this Court in *Carsby* is replete with testimony of both civilian and military personnel to the effect that the Airport Authority—and not the United States—operated the Greensboro Airport.

The Secretary of the Airport Authority offered the following uncontradicted statement:

“49. Q. By what other parties is the airport used?

A. The Airport Authority at the present time has leases outstanding with the Weather Bureau for quarters in the Administration Building; with the Civil Aeronautics Administration for quarters in the Administration Building; with Eastern Airlines for use of the runways, and facilities in the Administration Building. The Airport Authority operates its own hangers, too, and leases hanger space to private citizens for storage of their own private planes, who in turn use the airport runways.” (R. 274)

The Commanding Officer of the Army Air Station testified:

“13. Q. Has the Army had any control over the business office located on the airport grounds?

A. None whatever.” (R. 188)

“14. Q. Has the Army had any control over the data and operations office located on the airport ground?

A. None whatever.” (R. 188)

The Business Manager of the Airport was also interrogated as to the operations of the Airport. His testimony is as follows:

“12. Q. In regard to the use by the Army of the airport, does the Army have any control of the business management of the airport?

A. No." (R. 253-254)

"14. Q. In regard to the use by the Army at the airport, does the Army have any control over the administration at the airport grounds?

A. No." (R. 254)

"15. Q. In regard to the use by the Army at the airport, does the Army have any control over the hangars on the airport grounds other than the Army hangars.

A. No, it does not." (R. 254)

Thus in *Causby* there can be no doubt that the local Authority operated the airport in the same manner and to the same extent as Allegheny County operates the Greater Pittsburgh Airport and that the United States used the Authority's facilities at Greensboro in the same manner and to the same extent as any other large aircraft operator uses an airport's facilities today.

This fact becomes even clearer when one studies the following tabulation which the Court of Claims made of the actual plane movements over a seven-month period relevant

Date	Air liner	Civilian itinerant	Civilian local	Military	Monthly total
August 1943.....	242	289	2,584	1,576	4,691
September 1943.....	226	111	4,082	1,384	5,803
October 1943.....	256	115	3,647	1,598	5,656
November 1943.....	238	162	3,336	1,750	5,486
December 1943.....	232	147	3,892	1,542	5,813
January 1944.....	200	149	6,220	1,647	8,216
February 1944.....	184	112	854	1,552	2,702
Total 7 months' period.....	1,578	1,125	24,615	11,049	38,367

For present purposes, the significant fact emerges that of the 38,367 movements, only 11,049 were attributable to military aircraft and 27,318 were flights of non-government civilian aircraft.

Thus it is evident that this Court, in *Causby*, did not hold

the United States—as airport operator—liable for the invasion of Causby's rights. On the contrary, this Court held the United States to be the responsible party even though it is clear that the United States had no responsibility whatsoever for airport operations. It was the United States' aircraft that

“passed over respondents' land and buildings in considerable numbers and rather close together.” 328 U.S. at p. 259.

At no point in this Court's entire opinion is there the slightest inference that the Greensboro Airport Authority, the airport operator, was responsible for the Causby's damages. In fact, the question which this Court said was presented to it in *Causby* was

“whether respondents' property was taken within the meaning of the 5th Amendment by frequent and regular flights of army and navy aircraft over respondents' land at low altitudes.” 328 U.S. at p. 258.

This Court held that the aircraft operator—the United States—invaded the Causbys' land.

Similarly in the case at bar petitioner alleges that commercial airlines have flown their aircraft over his property, but as the Pennsylvania Supreme Court had observed

“he offered no proof that any of these planes were owned by the County of Allegheny or operated by its agents. Indeed, the viewers found as a fact that ‘There is no evidence of any control exercised over any aircraft by the County of Allegheny.’ That finding, supported as it is by the record, precludes the claimant from recovering against the County in this proceeding.” 402 Pa. 411, 168 A. 2d 123 (1961).

In the light of the foregoing, petitioner's contention that the County which admittedly flies no planes, nor exercises any control over the flight of aircraft, "took" his property under the authority of *Causby* is completely untenable. Far from supporting petitioner's contention that a reversal of the decision below is required by *Causby*, in point of fact, the opinion below is not only consistent with *Causby*, but required by *Causby*.

The rule thus laid down in *Causby* is not in any way changed or affected by the Federal Airport Act, 49 U.S.C. § 1101 *et seq.*, and the grant agreement which the County and the Federal Administrator have entered into pursuant to its terms. Petitioner's brief (pp. 16, 17) suggests that the County is liable to him for his alleged damages by virtue of the Federal Airport Act and the grant agreement. The fact, however, is that neither the Act nor the agreement has any bearing on the present controversy. In the first place, as the County's brief makes clear, whatever assurances the County has given to the United States under both the Act and the agreement have been carried out and there is and can be no claim that the County has breached any of its obligations in any respect.

Secondly, both the Act and the agreement are concerned solely with physical hazards and physical obstructions to air safety. The provision with respect to "easements or other interests in land or airspace" relates solely to structures or other land use "which would create a hazard" to the landing, taking off or maneuvering of aircraft or otherwise limit the usefulness of the airport. It cannot be plausibly claimed that the mere fact land outside an airport is owned or used by others creates a hazard to aviation or limits the use of the airport. Under the agreement the County is obligated to comply with the standards established by TSO N-18 (the CAA's Technical Standard Order No. 18)

which establishes specifications for obstruction-free approaches to airports. TSO N-18 specifies that objects which protrude into an imaginary surface should be removed or marked. TSO N-18 does not give any indication of the altitudes at which planes fly or fix or determine the limits of the navigable airspace. It merely provides substantial margins for aircraft safety. In short, TSO N-18 merely sets up standards for the purpose of determining what obstructions the Federal Administrator desires to be removed or marked. It has no application to the instant case.

Moreover, while the County has agreements with the airlines, the petitioner is not a party thereto, and the effect of the covenant of quiet enjoyment is not at issue in this case. Even assuming a possible breach, it would be grounds for a suit only by the airlines. It would have no bearing on the question of the County's liability to petitioner.

Finally we should note that *Causby* was commenced and decided before the passage of the Federal Tort Claims Act and hence the United States was then immune from suits sounding in tort. The only way the Causbys could get jurisdiction over the United States was by suing in the Court of Claims under the Tucker Act for an implied taking of their property. It was because of the Government's immunity from tort actions that this Court went beyond its primary finding that the flights were trespasses to consider whether they also constituted a taking. In the present case there is no reason to reach the constitutional question of a taking since here there is no problem of sovereign immunity from liability in tort. Thus no reason exists for extending the *Causby* holding to the point of declaring that the due process clause of the 14th Amendment requires that whenever flights by aircraft affect the use and enjoyment of property a remedy in the form of condemnation compensation must be afforded to the property owner.

To conclude, *Causby* fully supports the conclusion reached by the Pennsylvania Supreme Court in the instant case, that:

" * * * there has been no taking of the plaintiff's property by the County of Allegheny in the particulars complained of, and that, consequently, the County is not liable to the plaintiff for any deprivation of the use and enjoyment of his property by airplanes utilizing the Greater Pittsburgh Airport, * * * " 402 Pa. 411, 168 A. 2d 123 (1961).

Point IV

The County Cannot Be Liable for Any Alleged Taking of Petitioner's Property Because the Flights of Which Petitioner Complains Have Been Immunized by Federal Law.

It is respectfully submitted that in no event can Allegheny County be held liable for any alleged "taking" of petitioner's property because Federal law has immunized the commercial airline flights which petitioner alleges are the cause of the "taking" of his property. In rejecting petitioner's claim of immunity, the Pennsylvania Supreme Court stated:

"The county concludes, therefore, that the 'navigable air space' which Congress placed within the public domain includes all air space needed by an airplane for take-off or landing.

"While the conclusion has the rationale of reality to support it, we are precluded from adopting it by the Supreme Court's interpretation of similar regulations in *United States v. Causby*, 328 U.S. 256 (1946)." 402 Pa. 411, 168 A. 2d 123 (1961).

We shall here show that *Causby* does not preclude the adoption of the immunity argument.

Petitioner contends that his property was taken on June 1, 1952—the date of the opening of the Greater Pittsburgh Airport (R. 33). As of that date, Federal regulations promulgated by the CAB pursuant to specific authorization contained in the Civil Aeronautics Act of 1938 were in effect. Section 3 of that Act [49 U.S.C. § 403] declared the existence of

“a public right of freedom of transit in air commerce through the navigable air space of the United States
• • •”

thus creating or recognizing the existence of an easement comparable to the public easement of navigation in navigable waters.

The term “navigable air space” was defined in § 1 (24) [49 U.S.C. § 401 (24)] to mean

“air space above the minimum altitudes of flight prescribed by regulations issued under this Act.”

§ 205(a) of the Act empowered the CAB to issue whatever rules and regulations are necessary in order to

“exercise and perform its powers and duties under this Act.” [49 U.S.C. § 425(a)]

and § 601 [49 U.S.C. § 551(a)] provided in part that

“The Board is empowered, and it shall be its duty to promote safety of flight in air commerce by prescribing and reviewing from time to time * * * (7) Air traffic rules governing the flight of, and for the navi-

gation, protection, and identification of, aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft and between aircraft and land or water vehicles."

Pursuant to this authority, the Board issued "Civil Air Regulations", § 60.17 of which specified that no person shall operate aircraft over congested areas below an altitude of 1,000 feet or below 500 feet over non-congested areas

"Except when necessary for take-off or landing

• • •

The intent of the CAB that the 1,000-foot and 500-foot floors should not apply to aircraft landing and taking off is clear, as is also its intent that the minimums for those operations should be whatever altitudes are necessary for those purposes. Nevertheless, the court below rejected the County's claim of immunity under the above statutory and administrative provisions because of certain statements in *Causby*, 328 U.S. at p. 263, where Justice Douglas said that the fact that the glide path taken by the planes was that approved by federal regulations did not place the flights within the navigable air space which Congress had placed in the public domain.

While Justice Douglas did not expressly state what he was interpreting, an examination of the record on appeal in *Causby* makes it clear that he was not referring to the CAB's safe altitude regulation but rather to the CAA's then existing Technical Standard Order—18 (TSO N-18) which, as we have seen, is concerned solely with clearance criteria for structures in areas surrounding airports.

At all events, the CAB's minimum safe altitude regulation was materially amended after the *Causby* decision.

At the time of *Causby*, the minimum safe altitude regulation contained the following phraseology:

"Exclusive of taking off from or landing upon an airport or other landing area * * *." 14 CFR, Cum. Supp. [1944] 60.350.

The word "necessary" which now expresses a clear, though necessarily flexible, standard of minimum altitude was introduced only subsequently. 10 Fed. Reg. 5066, 5067.

Moreover, since *Causby*, the CAB issued its "Interpretation No. 1" of July 22, 1954 in answer to a request made by the President's Air Coordinating Committee in its May, 1954 report on Civil Air Policy. The Air Coordinating Committee, after pointing out that

"Doubt has been expressed as to whether the existing Federal regulations are so phrased as to make (the navigable airspace definition) operative throughout the take-off and landing operations of aircraft. *While this doubt is unjustified, resolution of the matter to remove all doubt as to the affirmative exercise of the jurisdiction of the Federal government in the airspace navigable in fact is considered desirable.*" (p. 47), (emphasis added)

recommended that the

"Existing Federal regulations relating to minimum altitudes of flight should be reexamined by the appropriate agencies to determine whether revision of such regulations is necessary or desirable in order to dispel any possible inference that the Federal government has not exercised its regulatory jurisdiction over the entire flight of an aircraft in the airspace above the United

States navigable in fact." (Civil Air Policy, the President's Air Coordinating Committee, May, 1954, p. 47).

Interpretation No. 1, therefore, makes it clear that the take-off and landing exception

"is . . . to be read as establishing a rule prescribing a changing but continuously effective minimum altitude for each instant of the climb after take-off and approach to landing; . . ." (C.A.R., Part 60, Interp. 1, 19 Fed. Reg. 4662).

The Interpretation points out that the CAB after reviewing its altitude regulations, Congress' intent, the subject's technical aspects, etc., determined that revision of the rules is neither necessary nor desirable since it had already prescribed the minimums for landings and take-offs. It concludes:

"In consideration of the foregoing, the Board construes the words 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in § 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. *Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of Section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable air-*

space." (C.A.R., Part 60, Interpretation No. 1, 19 Fed. Reg. 4663) (Emphasis added)

This conclusion is the official determination of the CAB itself, promulgated pursuant to the provisions of the Administrative Procedure Act. It accords not only with § 60.17's language but also with the intent of the Civil Aeronautics Act. It is clear that the flights in question—since the Board of Viewers specifically found that all were in accord with and none in violation of appropriate Federal rules and regulations—were within the navigable air space of the United States through which Congress granted a free right of transit.

The Federal Aviation Act of 1958 wrote into the Federal statute the legal situation as it then existed by virtue of the Civil Aeronautics Act of 1938, and the foregoing determination of the Civil Aeronautics Board. It not only reiterated the "public right of freedom of transit through the navigable airspace of the United States" found in the Civil Aeronautics Act of 1938, but expressly declared

" 'navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft."
§ 101(24) (Emphasis added)

Thus, there can no longer be any doubt that Congress has declared a ~~free right of~~ transit to exist in the "airspace needed to insure safety in take-off and landing of aircraft." This is, of course, the law at the present time. Moreover, the Act appears to be merely declaratory of the law in existence at all times relevant to this litigation.

The minimum safe altitude regulations of the Civil Aero-

nautics Board were not discussed in this Court's opinion in *Causby* and this Court did not pass upon the effect of these regulations in defining navigable air space. However the United States District Court for the Eastern District of New York did pass upon the meaning of these regulations in its opinion in *Allegheny Airlines, Inc. et al. v. Village of Cedarhurst et al.*, 132 F. Supp. 871, 882 (E. D. N.Y. 1955), where it said:

"The obvious meaning of the rule is that the minimum safe altitude for take-off or landing is whatever altitude is necessary for those operations. The Court construes the words 'except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing."

The District Court's holding on this point was affirmed by the Court of Appeals for the Second Circuit in an opinion by Judge Swan, 238 F. 2d 812, 815 (2 Cir. 1956).

Because this Court was not concerned with the minimum altitude regulations in *Causby* but rather with TSO N-18 and because those regulations were changed and made more specific and definite after the *Causby* decision, it is submitted that the decision below is incorrect insofar as it rejects the argument of immunity.

Since the flights of which petitioner complains were within the navigable air space through which Congress has declared a public right of freedom of transit to exist, a question may arise as to whether the United States has taken the petitioner's property within the meaning of the Federal Constitution.

Relevant in this connection is this Court's language in *Causby*: (p. 264)

"If any airspace needed for landing or taking off were included in the navigable airspace, flights which were so close to the land as to render it uninhabitable would be immune. But the United States concedes, as we have said, that in that event there would be a taking."

However that issue is one between petitioner and the United States and not between petitioner and the County. The fact is that Congress declared a right of transit to exist above the minimum altitudes for flight established by the Civil Aeronautics Board, and the CAB determined that in the case of aircraft landing and taking off the minimums should be whatever heights are necessary for that purpose. It may be that the Congressional declaration of a right of transit constituted a recognition of a pre-existing easement and merely limited its use to the space above the CAB minimums. Or it may be that whatever rights exist in air space, like those with respect to the marginal sea, have been created by the federal government. See *U. S. v. California*, 332 U. S. 19 (1947). Or it may be that Congress created the easement in the exercise of the right of eminent domain, and that property rights or interests of the petitioner were taken for which the United States must pay just compensation.

Interesting and important though these questions may be, they are not at issue in the present case. So far as this case is concerned, it is sufficient to say that the intent of Congress to establish or recognize the existence of the easement is clear,—that the CAB took the requisite action to establish minimums for landing and taking off,—that aircraft have a right of transit under the Act of Congress

and that a third party such as the County is not liable because the airlines choose to exercise this right.

Accordingly, it is respectfully submitted that the flights in question are immune by virtue of Congressional enactments and the County is not liable for any alleged "taking" of petitioner's property by virtue of those flights.

Conclusion

Your *amicus* respectfully submits that the decision of the Pennsylvania Supreme Court should be affirmed because petitioner has failed to exhaust the remedies afforded him under both State and Federal law, and thus cannot, at least at this stage of the proceedings, maintain that the remedies available to him deny him unconstitutionally due process rights (*Points I and II*); and in any event no basis in law exists for petitioner's contention that the Allegheny County as the operator of the Greater Pittsburgh Airport has "taken" his property or otherwise tortiously interfered with his property rights (*Points III and IV*).

Respectfully submitted,

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APPENDIX A

UNITED STATES MEMBERS OF THE AIRPORT OPERATORS COUNCIL

Alaska—Department of Public Works

Atlanta Department of Aviation

Bakersfield—County of Kern (California)

Baltimore Department of Aviation

Birmingham Department of Aviation

Boston—Massachusetts Port Authority

Charlotte—Douglas Municipal Airport (North Carolina)

Chicago Department of Aviation

Cincinnati—Kenton County Airport Board (Kentucky)

Cleveland Division of Airports

Columbus Metropolitan Airport & Aviation Commission
(Ohio)

Dallas Department of Aviation

Dayton Department of Aviation

Denver—Department of Public Works, City and County of
Denver

Detroit—Board of County Road Commissioners, Wayne
County

El Paso—City of

Evansville—Vanderburgh Airport Authority District
(Indiana)

Fort Worth—City of

Grand Rapids—Kent County Aeronautics Board
(Michigan)

Greenville Airport Commission (South Carolina)

Hawaii—Department of Transportation

Houston Department of Aviation

Jackson Municipal Airport Authority (Mississippi)

Jacksonville City Commission

Kansas City Aviation Department (Missouri)

**Lincoln—Airport Authority of the City of Lincoln
(Nebraska)**

Los Angeles Department of Airports

Louisville & Jefferson County Air Board

Mason City Municipal Airport Commission (Iowa)

Memphis—City of

Miami—Dade County Port Authority

Milwaukee County Department of Public Works

Minneapolis—St. Paul Metropolitan Airports Commission

Muskegon County Airport Board of Trustees (Michigan)

Nashville Aviation Commission

New Orleans Aviation Board

New Orleans—Board of Orleans Levee Commissioners

Newark and New York—Port of New York Authority

**Newport News—The Peninsula Airport Commission
(Virginia)**

Oakland—Port of Oakland Commission

Oklahoma City Airport Trust

Omaha Airport Authority

Ontario Airport Commission (California)

Orlando—City of

Philadelphia Department of Commerce

Phoenix—City of

Portland—Port of (Oregon)

St. Louis Department of Public Utilities

San Antonio Department of Aviation

San Diego—Port of

**San Francisco—Airport Department, Public Utilities
Commission**

San Juan—Puerto Rico Ports Authority

Savannah Airport Commission

Seattle—Port of Seattle Commission

South Carolina Aeronautics Commission

Stockton—Department of Aviation, County of San Joaquin

Tampa—Hillsborough County Aviation Authority
Tulsa Airport Authority

Waterloo Airport Commission
West Palm Beach—Board of County Commissioners
Wichita Board of Park Commissioners
Wilmington—Levy Court of New Castle County,

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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner,

v.

COUNTY OF ALLEGHENY

**On Writ of Certiorari to the Supreme Court of
Pennsylvania**

BRIEF FOR RESPONDENT AND APPENDIX

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COUNTER-STATEMENT OF THE CASE

This case is before this Court on certiorari granted from a decision of the Pennsylvania Supreme Court, *Griggs v. Allegheny County*, 402 Pa. 411, 168 A. 2d 123 (1961) (R. 80), sustaining the County's exceptions to a viewers' report and directing that the viewers' report be vacated and set aside. The exceptions to the viewers' report were filed pursuant to the provisions of the Second Class County Code, Art. 23, § 2623, 16 PS § 5623.*

The background of this case is fully set forth in the case of *Gardner v. Allegheny County*, reported at 382 Pa. 88, 114 A. 2d 491 (1955), and subsequently at 393 Pa. 120, 142 A. 2d 187 (1958). Briefly summarizing, the plaintiff, together with other property owners, brought actions in equity against Allegheny County and certain airlines, alleging: 1) continuing trespasses over their properties, and 2) a taking of their respective properties. In the *Gardner* case at 382 Pa. 88, the Supreme Court sustained the County's preliminary objections to the alleged "taking of property", and continued the case with respect

* Contemporaneously with the filing of exceptions to the viewers' report, which raised questions of law, cross-appeals were filed by the plaintiff and the County under the provisions of the Second Class County Code, Art. 26, § 2624. (16 PS 5624). These appeals are still open.

Under Pennsylvania law, questions of law are properly raised by exceptions to the viewers' report, and at the same time an appeal may be taken to the Court of Common Pleas where questions of fact are at issue: *Lower Chichester Twp. v. Roberts, et al*, 308 Pa. 195, 162 Atl. 460 (1932); *Allentown's Appeal*, 121 Pa. Super. 352, 183 Atl. 360 (1936). The specific findings of fact in this case to which no exceptions were filed by either party have the effect of an agreed statement of facts upon which the legal question could be raised.

Counter-Statement of the Case.

to an injunction for trespass. Subsequently, on June 3, 1958, in the *Gardner* case at 393 Pa. 120, the Supreme Court stayed the pending equity proceedings until the plaintiffs either proceeded under eminent domain or in actions of trespass.

A few days prior to June 3, 1958, the plaintiff filed a petition for the appointment of viewers alleging that aircraft of several airlines landing upon or taking off from the northeast runway of the Greater Pittsburgh Airport descended and ascended over plaintiff's property below the safe navigable air space as fixed pursuant to acts of Congress and that by reason of said low flights the property of the plaintiff was greatly damaged and depreciated in value. The plaintiff further averred that the defendant, by reason of its power of eminent domain, had, in fact, appropriated for public use an easement or fee simple interest in the air space over the plaintiff's property. Following proceedings before the Board of Viewers, a report was filed by the Board of Viewers in which it made certain findings of fact and conclusions of law.

The findings of fact made by the Board of Viewers included the following: (R. 34; 49; 59)

"29. There is no evidence of any control exercised over any aircraft by the County of Allegheny.

"30. All flights into and out of the Greater Pittsburgh Airport are regulated by the Civil Aeronautics Administration of the United States of America.

"31. No flights of aircraft have been shown to be in violation of any regulations of the Civil Aeronautics Administration.

Counter-Statement of the Case.

"32. No flights were shown to be lower than necessary for a safe landing or a safe taking-off."

The Board of Viewers also accepted the Finding of Fact submitted by defendant that "aircraft flew over plaintiff's property at *indeterminate* altitudes." (Emphasis supplied.) (R. 34, R. 48)

The Board of Viewers in its discussion concluded that there was an act of dominion or condemnation by the County of Allegheny and further, that

"The 'taking' of the superterranean easement over the property of Griggs became effective on June 1, 1952, at 12:01 A.M., by virtue of the Resolution of the Commissioners of Allegheny County dated May 27, 1952, designating that date and hour as the time for the opening of the Greater Pittsburgh Airport for public user. Consequently, the right to damages accrued at that time." (R. 37).

The Board of Viewers awarded Griggs damages in the amount of \$12,690.00. Griggs filed exceptions to the viewers' report and he also appealed the award to the Court of Common Pleas of Allegheny County where the question of damages would be heard de novo. The County, contending that it was not liable for any damage allegedly suffered by the claimant, filed exceptions to the viewers' report setting forth therein that, based on the viewers' findings of fact, there could be no taking of Griggs' property by the County. The County also appealed the award of the Court of Common Pleas on the question of damages. The Court of Common Pleas, acting only on the exceptions and not on the appeal, and passing only on the legal questions involved, dismissed

Counter-Statement of the Case.

the County's exceptions. The Supreme Court of Pennsylvania reversed the dismissal of the County's exceptions and directed that the viewers' report be vacated and set aside.*

The Pennsylvania Supreme Court did not pass upon the question of whether the plaintiff had shown or suffered a substantial deprivation of the beneficial use and enjoyment of his property, but did determine that the record precluded any claim for such deprivation against the County of Allegheny, assuming that there had been damage to the plaintiff's property. (R. 80 et seq.).

* The difference between exceptions and appeal is set forth in the footnote on p. 1 of this brief and is also referred to in the Pennsylvania Supreme Court's opinion (R. 81).

Summary of Argument.

SUMMARY OF ARGUMENT

1. Neither approval of a master plan by the County Commissioners, nor the execution of grant agreements between the County and the Federal government, nor the opening of the airport for use, could constitute a taking of the plaintiff's property.

2. Since plaintiff has not exhausted other remedies that are available to him before the Federal Aeronautics Administration and in the State courts, the present controversy is not ripe for decision by the United States Supreme Court since it will, in effect, be passing prematurely and most probably unnecessarily on a Federal constitutional question. That is particularly true because of the availability of proceedings before the Federal Aeronautics Administration in which plaintiff could obtain relief, if warranted, because of flights of which he complains.

A. The draft and approval of the master plan in no way committed the County to any action, nor is it, under State law, an act of eminent domain, nor does it fix or determine any property rights.

B. The execution of grant agreements was not a taking of plaintiff's property. Such agreements relate only to the removal of objects which protrude into an imaginary surface at airports fixed by the federal government and are executed for the purpose of securing Federal funds. The agreements give no rights to any of the parties to the agreement or to any outsiders concerning the taking of any property. It should also be noted that there is no claim that

Summary of Argument.

these agreements have been violated, and in fact they have not been violated.

C. The opening of the airport for use did not constitute a taking of plaintiff's property. Even assuming the plaintiff's theory that under the case of *United States v. Causby*, 328 U. S. 256, (1945), there was a taking of plaintiff's property, such taking could not occur merely by the opening of the airport. If there was a taking of property, such taking could occur only after the nature, character, frequency and permanency of the flights were definitely ascertained and there was an actual substantial deprivation of the beneficial use and enjoyment of the property.

3. Flights of aircraft within the navigable air space, that is, flights that are in accordance with Federal regulations and not lower than necessary for a safe landing and take off, are declared by Federal law immune and cannot be made the basis of a claim for a taking of property by the municipal owner of an airport.

A. Flights of aircraft within the navigable air space cannot be made the basis of a claim for a taking of property, certainly not against the County. Since Congress has declared "a public right of freedom of transit" for air commerce in the navigable air space for any citizen of the United States, all flights within the navigable air space are thus declared to be immune and in any event cannot be the subject of action for the taking of property against the County.

Summary of Argument.

B. Flights of aircraft that are in accordance with the Federal regulations and are not lower than necessary for *safe* landing and takeoff are flights within the navigable air space. The navigable air space, as defined by the Civil Aeronautics Board and interpreted by that Board and by the courts, and recognized by Congress, includes all air space *necessary for safe* landing and takeoff, regardless of the altitude involved.

4. Even if it were assumed that the flights in the present case were not within the navigable air space, Allegheny County was not the efficient cause of any damage which the plaintiff may have suffered, as the Supreme Court of Pennsylvania pointed out in its decision here involved. The County of Allegheny did not operate or exercise any control over any aircraft in and out of the airport. All flights are regulated by the United States.

5. Where the highest court of the State has determined that the facts complained of do not constitute a taking or injury of plaintiff's property by the County, and the plaintiff has been afforded a forum for such determination, there has been no deprivation of due process under either the State or Federal Constitutions.

Argument.

ARGUMENT

I. Neither the Approval of a Master Plan by the County Commissioners, Nor the Grant Agreement Between the County and Federal Government, Nor the Opening of the Airport Are Events Which Constitute a Taking of Plaintiff's Property.

A. The Master Plan

It is clear that the question of whether the adoption of a master plan by the County Commissioners is an act of eminent domain is a question of State Law. *Sauer v. City of New York*, 206 U.S. 536, 548 (1907).

Therefore, the determination by the Pennsylvania Supreme Court on that question is final. That court stated:

"In unwarrantedly awarding damages to Griggs, the viewers relied upon a finding of fact that the County, in compliance with rules and regulations of the Civil Aeronautics Authority, drafted a 'Master Plan,' showing an 'approach area' over part of Griggs' property, which plan was submitted to and approved by the Civil Aeronautics Authority. But the drafting, submission, and approval of the plan did not give the County an easement of avigation over Griggs' property, nor was any evidence offered to show that such action deprived Griggs of any use and enjoyment of his property, substantially or otherwise." (R. 85)

The Pennsylvania Supreme Court was merely recognizing that approval of a master plan by a board of

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county commissioners has no effect on any land owner. It may be abandoned or modified by the commissioners, or it may be subsequently disapproved or modified by the Federal authorities. The master plan is simply a proposal which must be subsequently implemented in order to have any effect.

B. The Grant Agreement

Project application No. 9-36-029-801 (referred to as the grant agreement), dated June 7, 1948, between the County of Allegheny and the United States is one of many similar agreements entered into between the County and the United States and similar to agreements entered into between other airport operators and the United States.

The entire paragraph [Section 1(j), (actually 1(i)) sponsor's assurance agreement] only a portion of which was referred to by the viewers in this case, reads as follows:

"(1) Insofar as is within its power and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in land or air-

Argument.

space, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing, taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator."

The complete agreement, together with the amendment to the Grant Agreement, is printed in the Appendix to this Brief. (p. 45 et seq.)

Grant agreements are for the purpose of securing federal aid in the construction of airports, and the sponsor's assurances in such agreements are for the purpose of having the airport operators meet the standards set up by the United States. Included in these standards is Administrator's Technical Standard Order N-18, known as TSO-N-18, which does not regulate flight, but establishes the standard for obstruction-free approaches to airports. The purpose of these assurances is to provide that objects protruding into an imaginary surface fixed by the federal government should be removed or marked. TSO-N-18 does not fix the minimum safe altitude of flight nor determine the limits of navigable air space. It does not give any indication of the altitudes of flights. It

Argument.

merely provides substantial margins for aircraft safety.¹ The provisions of TSO-N-18 are merely standards set up for the purpose of determining what obstructions the United States desires to be removed or marked.

Whatever assurances the County of Allegheny has entered into with the United States have been carried out. Many other such agreements have been entered into and are being entered into continually by the County with the United States, and there is no allegation that any claim has ever been made by the United States that the County of Allegheny has not carried out its obligations under these agreements.

The agreement between the County and the United States of America cannot give rise to any legal right in the plaintiff. On this subject, the law in Pennsylvania has been settled in *Keefer v. Lombardi*, 376 Pa. 367, 102 A.2d 418 (1954), where the Pennsylvania Supreme Court said:

"The law of Pennsylvania is clearly in accord with the Restatement, Contracts (Section 145) on this subject: 'A promisor bound to the United States or to a State or Municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation

¹The Government's brief before the United States District Court in the *Cedarhurst* case, *infra*, pointed out at page 72:

"TSO-N-18 does not authorize aircraft to fly at any altitude. All air carrier operations are conducted with large margins of safety. The lowest any aircraft would ever fly would be a substantial height above any obstruction".

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for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences *** (Emphasis supplied)."

C. The Opening of the Airport

The Board of Viewers determined that there was a taking on June 1, 1952, the day that the County opened the airport for use. Plaintiff had argued before the Board that this was the law. This is wholly inconsistent with the plaintiff's position that there was a taking because of the principles of law enunciated by your Honorable Court in the *Causby* case.

In the *Causby* case This Court determined that there was a taking because there was such repeated interference by the aircraft in that case with the enjoyment of the land owner's property as to constitute a taking.

The mere opening of an airport does not constitute such repeated use of airways over a land owner's property. It could be that the flights over a particular land owner's property would not even amount to a tort, much less a constitutional taking under the principle of the *Causby* case. It is also conceivable that although an airport were opened and although flights were planned over a particular piece of property, the airport would be so used that there may be no flights over that particular property.

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The Pennsylvania Supreme Court in the *Gardner* cases, following this Court's language in the *Causby* case, indicated that whether or not there would be a taking of property and the extent of such a taking, whether in fee or merely an easement, or whether the flights would constitute a trespass, or whether the flights would not constitute any cause of action, depended upon the nature, character, frequency and permanency of the flights.

As of the date of the opening of the airport—June 1, 1952—no flights whatsoever had occurred, so that under no circumstances could it be said that anything had occurred with respect to the plaintiff's property on such date, nor was there any way of determining by using the tests indicated by the Court what the nature and extent of the taking was. The Pennsylvania Supreme Court had said in an earlier case, *Crew v. Gallagher*, 358 Pa. 541, 548, 58 A.2d 179, (1948):

"After the establishment of a regular flight traffic pattern, if airplanes fly very close to plaintiff's buildings, or in any other way cause real damage to plaintiff's property, adequate relief in equity will be available to them" (Emphasis supplied)

The determination that the date of the opening of the airport, June 1, 1952, is the date of a taking of property by reason of flights is completely unrealistic. To show how unrealistic such a basis is, let us assume that "A" owns property near the airport. On June 1, 1952, the date of the opening of the airport, some few flights occurred over "A's" property or, as in the instant case, no flights occurred for some period of time. "A" then sells the property to "B" in December of 1952.

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The flight pattern then develops and numerous flights occur over the property in 1953 and thereafter. If plaintiff's contention is adopted, an easement was taken from "A" on June 1, 1952, but in order to prove his damage, "A" would have to prove interference on a subsequent date with property owned not by "A" but by "B". Therefore, "A" would have a right of action, but the testimony as to damages would be determined by the effect not on "A" but on the subsequent owner. On the other hand "B", the owner of the property at the time of the physical interference takes place, would, under the plaintiff's position, have no cause of action whatsoever. Are not the decisions of this Court and the Pennsylvania Supreme Court, requiring a showing of the nature, character, frequency and permanency of the flights, based on a much more solid and reasonable foundation?

Plaintiff, in his testimony before the Board of Viewers, (R. 22 to R. 27) seems to predicate his theory of liability solely on the fact that unidentified planes flew over his property some time after June 1, 1952. For this reason, the County before the Board of Viewers did not introduce testimony inasmuch as it was apparent that the tests laid down by the Pennsylvania Supreme Court and this Court in the *Causby* case concerning the height and frequency of flights had not been met. The contention of plaintiff seems to be that the mere flight of aircraft over his property is sufficient to show liability against the County. Such a contention ignores the tests set forth in all the heretofore reported cases. No one now upholds the validity of the theory that the property owner owns from the center of the earth to the end of the sky.

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II. Since Plaintiff Has Not Exhausted Other Remedies That Are Available to Him Before the Federal Aeronautics Administration and in the State Courts, the Present Controversy Is Not Ripe for Decision by the United States Supreme Court Since It Will, in Effect, Be Passing Prematurely and Most Probably Unnecessarily on a Federal Constitution Question.

A. *This Court will not prematurely pass upon constitutional questions.*

This Court has declared on many occasions that it will avoid making premature and perhaps unnecessary determinations of constitutional questions.

In the case of *Kovacs v. Brewer*, 356 U.S. 604, (1958) this Court stated the principle as follows:

"As presented the case obviously raises difficult and important questions of constitutional law, questions which we should postpone deciding as long as a reasonable alternative exists."

To the same effect is *Communist Party of U.S. v. Subversive Activities Control Board*, 351 U.S. 115 (1956). In that case, at page 122 of 351 U.S. of the opinion, your Honorable Court said the following:

"At the threshold we are, however, confronted by a particular claim that the court of appeals erred in refusing to return the case to the Board for consideration of the new evidence proffered by petitioner's motion and affidavit. This non-constitutional issue must be met at the outset, because the case must be decided on a non-constitutional issue, if the record calls for it, without

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reaching constitutional problems. *Peters v. Hobby*, 349 U.S. 331."

To the same effect is *Benanti v. U.S.*, 355 U.S. 96 (1957), in which your Court, in a case involving evidence obtained by wire tapping by state enforcement officers, at page 199 of the opinion, stated as follows:

"Petitioner, relying on this Court's supervisory powers over the federal court system, claims that the admission of the evidence was barred by the Federal Constitution and Section 605. *We do not reach the constitutional questions as this case can be determined under statute.*"

See also *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129; *Neese v. Southern Railroad Co.*, 350 U.S. 77; *Peters v. Hobby*, 349 U.S. 331.

On the present state of the record, it appears that plaintiff is asking this Court to do precisely what the cases cited above indicate should not be done. Plaintiff, by his insistence during the course of this litigation that there was a taking of his property and that that taking was by the County of Allegheny, has failed to pursue other remedies that are available to him both before the Federal Aviation Agency and the State courts. If plaintiff had resorted to these remedies he would not now be asking the Supreme Court of the United States for what is, in effect, a declaratory judgment on a constitutional question when it is not even clear under State law whether he has made out a case in the appropriate State tribunals.

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B. *Plaintiff has a remedy available under the Federal Aviation Act.*

The Civil Aeronautics Act of 1938, as amended, Act of June 23, 1938, C. 601, Title X, § 1005, 52 Stat. 1023; 49 USCA 645, provides in part as follows:

"* * * whenever the Board is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Board is authorized, either upon complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: PROVIDED FURTHER, That the Board shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter."

Under the provisions of the present Act of Congress, which governs this situation, Public Law 85-726, Title X, § 1002, August 23, 1958, 72 Stat. 788, 49 U.S.C.A. 1482, there is set forth a complete procedure which is presently available to the plaintiff in this case:

"(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of

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this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of * * *

In both Acts, provision is made for appeal to the Court of Appeals and to the United States Supreme Court. Here is afforded to the plaintiff an administrative remedy which he could have pursued and which is a complete answer to his problem.

It is submitted that the plaintiff should have pursued his remedy before the Civil Aeronautics Board, whose Administrator "is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time [inter alia] * * *

"6. Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce." (Pub. L. 85-726, Title VI § 601, Aug. 23, 1958, 72 Stat. 775, 49 U.S.C.A. 1421)

In the case of *City of Newark, N. J., et al. v. Eastern Airlines, Inc., et al.*, 159 Fed. Supp. 750 (1958) which originally involved an action by three cities, two townships, six individuals and the Newark Airport Mayor's Committee, against seven airlines, the Port of New York Authority, the United States of America, and the Civil

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Aeronautics Agency, to enjoin the defendants from flying below 1200 feet from the ground, to award damages, and to compel the Port Authority and the United States to acquire by condemnation the plaintiff's property, the Court went in detail into the powers of the Civil Aeronautics Board to enact rules for minimum safe altitudes of flight, the rules actually adopted by the Civil Aeronautics Board and the effect of these rules. It cited the *Causby* case and the case of *Allegheny Airlines, Inc., et al. v. Village of Cedarhurst et al.*, 238 F. 2d 812 (1956), the latter for the proposition that the Federal regulatory system has preempted the field of safety regulation below as well as above 1,000 feet from the ground. The Court held in effect that it could not, by judicial decree, unwarrantedly interfere with the regulatory power vested in the Civil Aeronautics Board since this would result only in an unseemly conflict between the Civil Aeronautics Agency and the Court. The Court further pointed out that such a piecemeal approach, if followed by every major airport of which there were at the time 194, would completely destroy the uniformity contemplated by the Civil Aeronautics Act. The Court then directed the plaintiffs to pursue their remedy before the Civil Aeronautics Board petitioning for the issuance or amendment of the rules governing minimum safe altitudes or flight patterns. In this connection it could be pointed out that the Federal Aviation Agency has even mandated so-called anti-noise flight patterns for Los Angeles Airport and New York International Airport (*Los Angeles International Airport Traffic Pattern Area Rules*, 25 F.R. 1764 (1960); *New York International Airport Traffic Area Rules*, 25 F.R. 8538 (1960)).

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The plaintiff in this case should have pursued this administrative remedy which is reviewable by the courts and which would have made further resort to the State courts and to this Court clearly unnecessary.

C. Plaintiff has State remedies available

Besides the existence of a possible remedy before the Federal administrator, plaintiff still has, as indicated above, possible remedies under State law. His equity case is still pending before the Court of Common Pleas of Allegheny County in which injunctive relief and damages are sought against the airlines and the County. The Supreme Court of Pennsylvania, passing on Pennsylvania law, has indicated that an action in trespass might be available under State statutes. Plaintiff contends that these remedies are illusory and that he will be left with no remedy. In effect, he is asking this Court to rule on a question of Pennsylvania law contrary to what the Pennsylvania Supreme Court has already ruled. The New Jersey District Court, in the *City of Newark* case, *supra*, found that there could be a remedy in tort against the airlines in a similar situation under State law and did not consider that remedy illusory.

Plaintiff's argument is really predicated on the proposition that the County ought to be liable because other remedies may be difficult or inconvenient. Liability because of convenience is a new proposition in the law. Liability because of difficulty in proving a case against other parties (which difficulty is perhaps more imaginary than real, because of Pennsylvania's broad discovery procedures at pre-trial) is a new proposition in the law. Plaintiff has even suggested in his Petition for

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Certiorari that the difficulty in proving such cases is in itself a deprivation of due process. Certainly, this too is a novel proposition. Is not ultimately the plaintiff trying to prove a constitutional taking by the County because of the tortious conduct of others or even perhaps because of the difficulty of proving the tortious conduct of others?

It might be noted also that before your court is a record only of Viewer's proceedings which are not determinative on factual questions and which are subject to review, in the pending appeals, by a judge and jury in the Pennsylvania Common Pleas Court. If, in effect, the Pennsylvania Supreme Court has given a declaratory judgment on facts which must be reviewed *de novo* in the State courts, plaintiff is still asking this Court to render another declaratory judgment in opposition to that of the Pennsylvania Supreme Court. In view of the other remedies possible to the plaintiff which he has not yet attempted to exhaust, it is submitted that he is asking this Court to make a premature determination of issues which might be rendered unnecessary if plaintiff had resorted to proper remedies available to him in other tribunals.

Argument.

III. Flights of Aircraft Within the Navigable Air Space, That Is, Flights That Are in Accordance With Federal Regulations and Not Lower Than Necessary for a Safe Landing and Takeoff, Are Declared by Federal Law Immune and Cannot Be Made the Basis of a Claim for a Taking of Property by the Municipal Owner of an Airport.

The Pennsylvania Supreme Court in the *Gardner* case at 382 Pa. 88, at page 99, following the decision of this Court in the *Causby* case, said:

"* * * Congress, by the Civil Aeronautics Act of 1938, 52 Stat. 973, 977, 1028, §1107 (i) (3), 49 U.S.C. §176 (a), enacted: 'The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.' This provision originated in the Air Commerce Act of 1926, 44 Stat. 568, 572, §6. The 1938 Act also declares 'a public right of freedom of transit' for air commerce in the navigable air space to exist for any citizen of the United States. 52 Stat. 980, §3, 49 U.S.C. §403."

At page 107 the Court said:

"The Acts of Congress, as above noted, appropriate for air travel the navigable air space throughout the United States and then *define navigable air space as 'air space above the minimum*

Argument.

safe altitudes of flight prescribed by the Civil Aeronautics Board (formerly Authority')."

In accordance with its powers to implement the Civil Aeronautics Act, the Civil Aeronautics Board adopted the Regulation 60.17, which has since been codified into statute by Congress. The regulation in question provides as follows:

"... The Board's Regulation 60.17 provides: 'Regulation 60.17. Minimum Safe Altitudes. *Except when necessary for take-off or landing* no person shall operate an aircraft below the following altitudes:

'(a) Anywhere. An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

'(b) Over congested areas. Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft ...

'(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure ..."

The position of the County and of the Federal agencies who participated in the *Gardner* case at 382 Pa. 88, was that the navigable air space consisted of whatever

Argument.

air space was reasonably necessary for safe take-off and landing, regardless of the altitude. It is respectfully submitted that the Supreme Court specifically adopted that position when it said at page 108 of 382 Pa.:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication. However, since take-offs and landings are obviously absolutely necessary if there are to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is *reasonably necessary* for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

This is in complete accord with the Civil Air Regulation No. 60.17 interpretation of No. 1, adopted by the Civil Aeronautics Board on July 22, 1954, a copy of which is attached to this brief. It will be noted that on page 1 of this interpretation it is stated: (Appendix p. 60)

"* * * Directly involved is the question whether the airspace which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term 'navigable airspace' as defined in the Civil Aeronautics Act. If it does, a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by section 3 of that Act."

Argument.

And on page 4: (Appendix p. 65)

"In consideration of the foregoing, the Board construes the words 'Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes' where such words appear in § 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the aircraft climbs after take-offs and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace." [Emphasis supplied]

The United States Court of Appeals for the Second Circuit, in the *Cedarhurst* case, *supra*, has adopted exactly the same position as the Pennsylvania Court in the *Gardner* case. In that case, not only did the Court interpret the regulations exactly the same way as the Pennsylvania Court did, but it also determined that the promulgation of the regulations was proper and not an invalid delegation of legislative power. In that case the Court said:

"The appellants do not dispute that the federal government has preempted the field of regulation and control of the flight of aircraft in the air space 1,000 feet or more above the ground. The dispute relates to lower reaches of air space which are necessary for take-offs from and landings at airports.

Argument.

As to this the appellants contend, in substance, (1) that Congress has not purported to preempt the air space under 1,000 feet; and (2) that the Regulations of the Civil Aeronautics Board and the Administrator, which in some circumstances require planes leaving or landing at Idlewild to pass over Cedarhurst at an elevation as low as 450 feet, are invalid.

* * * * *

The first contention is refuted by the terms of the Civil Aeronautics Act of 1938, Section 3, 49 U.S.C.A. § 403 declares

“There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable air space of the United States.”

Section 2, 49 U.S.C.A. § 402, directs that in exercising its powers and performing its duties under the Act, the Board shall consider as being in the public interest and in accordance with the public convenience and necessity ‘(e) The regulation of air commerce in such manner as to best promote its development and safety.’ Section 601, 49 U.S.C.A. § 551 (a) empowers and directs the Board

“* * * to promote safety of flight in air commerce by prescribing and revising from time to time—

* * * * *

(7) Air traffic rules governing the flight of * * * aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft and between aircraft and land or water vehicles.’

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The foregoing provisions contain no suggestion that "navigable air space" is restricted to air space not less than 1,000 feet above the ground. On the contrary the Congressional purpose is clear to empower the Board to make rules as to safe altitudes of flight at any elevation since its rules were to have, among other objects, prevention of collisions between aircraft, and between aircraft and land or water vehicles. Obviously the greatest danger of such collisions is when an aircraft takes off or lands. Appellants' argument that the Board has itself established the minimum safe altitude of flight over a congested area, such as Cedarhurst, at 1,000 feet, completely disregards the express exception of take-off and landing stated in the regulation. The federal regulatory system, if valid, has preempted the field below as well as above 1,000 feet from the ground."

With respect to the contention that the promulgation of such regulations was an invalid delegation of legislative power, the Court said:

"It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle * * * such legislative action is not a forbidden delegation of legislative power.' *Hampton Co. v. United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied'.

Argument.

It would be utterly impracticable to attempt to specify by statute the precise height at which a plane could safely take off from or land at an airport, since in each instance decision must depend on many variants, such as weather conditions, character of the terrain, locations of cities and of airports, size and weight of the plane and its cargo, and other relevant factors. Such decisions can only be made by some specially equipped administrative agency which can act ad hoc to carry out the congressional policy declared by statute. Again and again delegations to such agencies have been sustained where the standards for administrative action were less precise than in the case at bar."

Thus, under the regulations of the Civil Aeronautics Board, as interpreted by the Board and as determined by the Pennsylvania Supreme Court in the *Gardner* case and by the United States Court of Appeals for the Second Circuit in the *Cedarhurst* case, a flight is within the navigable air space if reasonably necessary for a safe landing and takeoff, regardless of the altitude at which it may be made.

The Pennsylvania Supreme Court in this case says that this conclusion has the rationale of reality to support it, but seems to feel that it is precluded from adopting this position because of *United States v. Causby* and because of the fact that Congress did not enact it into statute until 1958. However, as the U.S. Court of Appeals for the Second Circuit has indicated, in the language quoted above, the regulations promulgated by the Civil Aeronautics Board were in accordance with previous delegation of powers made to the Board by Con-

Argument.

gress and, therefore, fully effective on the date the present litigation arose. This position, it is submitted, is not inconsistent with the *Causby* case which is the only decision of the United States Supreme Court on this subject. In that case your Honorable Court said:

"If any air space needed for landing or taking off were included (in the term 'navigable air space') flights which were so close to the land as to render it uninhabitable would be immune."

It is, therefore, submitted that every court that has reviewed this problem, including the United States Supreme Court, with the exception of the Supreme Court of Washington in the case of *Ackerman v. Port of Seattle*, 55 Wn (2d) 400 348 P. 2d 664 (1960), has decided that *safe flights* necessary for landing or take off are within the navigable air space and immune.

The plaintiff in this case has persistently referred to navigable air space as meaning the air space only above 500 feet. This arbitrary figure of 500 feet has never been recognized by any court as being the limit of navigable air space. On this point, the position of the plaintiff is identical with the position of the Village of Cedarhurst in the *Cedarhurst* case, in which the contention was specifically and clearly overruled. It is to be noted also that the Pennsylvania Supreme Court in the *Gardner* case, 382 Pa. 88 specifically refused to adopt this position and did not, as a matter of fact, adopt it in the present case where this question, although discussed, is not determined. Although the Pennsylvania Supreme Court thus avoided the question of the limits of navigable air space, it is submitted that that same court had already answered this question in the first *Gardner* de-

Argument.

cision, 382 Pa. 88, at page 108, when it interpreted the regulations of the Civil Aeronautics Board which were in effect at the time of the opening of the Greater Pittsburgh Airport:

"Regulation 60.17 defines and prescribes the air space appropriated for take-offs and landings, if at all, only negatively and by implication. However, since takeoffs and landings are obviously absolutely necessary if there is to be interstate flights, or indeed if there is to be any flying at all, reason and common sense impel the conclusion that Congress must have intended the Federal Agencies to have the right and power to prescribe and appropriate for public use such air space as is *reasonably necessary* for take-offs and landings. This naturally will vary with terrain, wind conditions and other factors and consequently it is difficult and may be impractical and unwise to attempt to more particularly define such air space."

To any possible objection that this interpretation of the regulations of the Civil Aeronautics Board is

¹At the time of the *Causby* case, the minimum safe altitude regulation contained the following language:

"Exclusive of taking off from or landing upon an airport or other landing area . . ."

The word "necessary" which now expresses a clear, although flexible standard of minimum altitude was introduced only subsequent to the *Causby* case, but prior to the matters involved in the instant case. This was a material change and the Civil Aeronautics Board, the Pennsylvania Supreme Court, and other courts have defined the present regulations to mean that navigable air space means any air space, regardless of altitude, necessary for landing or take-off.

Argument.

confiscatory it must be noted that implicit in any definition of the term "navigable air space" is the idea of *safe* landings and takeoffs. It is not the County's position that planes can fly in and out of the Greater Pittsburgh Airport at a height above buildings or land which would render such flights unsafe. However, in the instant case, there has been an explicit finding by the Board of Viewers, which was adopted by the Court of Common Pleas and the Supreme Court of Pennsylvania, that the flights in question are *safe* for air travel. Rule 60.17 of the Civil Aeronautics Regulations, promulgated by the Civil Aeronautics Board (14 C.F.R. 60.17), prescribes as minimum safe altitudes for takeoff and landing the lowest altitude at which it is necessary to fly in order to accomplish a safe takeoff and landing. This furnishes a standard of altitude of such flights. It is unlawful to fly lower on takeoff or landing than is necessary in the light of reasonably safe standards applied to the circumstances of the flight. Therefore, lawful takeoff and landing flights are in the navigable air space. Flights which are dangerous because they are too close to the land or too close to structures on the land would be unlawful because they would not be safe. The attention of this Court is respectfully directed again to the finding of the fact by the Board of Viewers that all the flights in the instant case were not in violation of any regulations of the Civil Aeronautics Administration nor lower than necessary for a safe landing or a safe takeoff.

Moreover, it should be noted that all this interpretation does is to legalize flights that might constitute nuisances or trespass or other forms of tortious conduct. Congress certainly possesses the power to change appli-

Argument.

cable tort law as regards the instrumentalities of Interstate Commerce.

Furthermore, if it should be argued that the regulations authorize such substantial deprivation of property that they are beyond Congress's power—and there is no such evidence in this case—then plaintiff may conceivably have a cause of action against the United States—after having first exhausted his administrative remedies before the federal regulatory agencies as pointed out above and this Court would, at that time, have before it the precise question it said it did not have before in the *Causby Case*—the constitutionality of the federal regulatory scheme. As this Court said in the *Causby* case at p. 263 of 328 U.S. 257:

"If that agency [the then CAA] prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation. But nothing of the sort has been done."

What the Supreme Court said was not done in the *Causby* case has now been done by CAB regulation 60.17, the interpretative regulation No. 1, the *Cedarhurst* case, the *Gardner* case at 382 Pa. 88 and the Federal Aviation Act of 1958.

Whatever the result of this constitutional question, which is not now before this Court, that question is something between the plaintiff and the United States; but in no event under the regulations promulgated by the federal regulatory agencies pursuant to Act of Congress, can it be said, let alone held, that the County has taken any property beyond the confines of the Airport.

Argument.

Reference has already been made to the case of *Ackerman v. Port of Seattle*, Supra, which is the only case holding contrary to the County's position. The Court's attention is called to the dissenting opinion in that case which states at page 673 of 348 P. 2d:

"United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, is cited by the majority opinion, but it does not support it. I quote from the Causby case [328 U.S. at page 266, 66 S. Ct. at page 1068]:

"The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment [United States Constitution.] The airspace, apart from the immediate reaches above the land, is part of the public domain * * *

It goes on to define the public domain as the air above the minimum safe altitude of flight prescribed by the Civil Aeronautics Authority.

There are no allegations in the complaint that the flights are in violation of the rules of the Civil Aeronautics Authority. Hence, there has been no invasion of plaintiff's property or any constitutional taking of it under the rationale of the Causby case."

In connection with this entire problem, the concurring opinion of Mr. Justice Jackson in the case of *North-West Airlines, Inc., v. State of Minnesota*, 322 U. S. 292, 302-303, is very pertinent:

"Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified.

Argument.

Today the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

"Students of our legal evolution know how the Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat 1, to *United States v. Appalachian Electric Power Co.*, 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

IV. Even If the Flights Should Be Considered Not Within the Navigable Air Space or Within the Navigable Air Space and Not Immune, the County of Allegheny Has Not Been the Efficient Cause of Any Damage That Might Result From the Flights.

The Board of Viewers found that there was no control exercised over any aircraft by the County of Allegheny and that all flights into and out of the Greater Pittsburgh Airport were regulated by the Civil Aeronautics Board of the United States. It is a fact that in the control of airplanes flying in and out of the Greater Pittsburgh Airport the County of Allegheny has abso-

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lutely no right or permission to even be within the confines of the Federal aviation authority facilities at the airport.

As the concurring opinion in the *Northwest Airlines* case, *supra*, has stated:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to Federal Government alone and not to any state government."

The position of the County in the present case differs radically from that of the United States government in the *Causby* case. In *Causby*, the planes were owned by the United States, they were flown by personnel of the United States and were flown under regulation promulgated by the United States. In the present case, the County does not own the planes, does not supply the personnel to man the planes, and does not promulgate any regulations. While this Court in holding the United State of America liable in the *Causby* case, did not explicitly relieve the owner of the airport from liability, such a finding is implicit in this Court's decision.)

Argument.

The position of the Greensboro High Point Authority, which operated the airport in *Causby*, was exactly the same as the position of the County of Allegheny in this case. A review of the transcript or record in that case indicates that the Greensboro High Point Authority was the operator of the airport in that case just as the County of Allegheny is the operator in the present case. On page 218 of the transcript of record submitted to the Supreme Court in the *Causby* case, there is printed in full the lease between the Greensboro High Point Airport Authority and the United States of America. Paragraph 2 of the lease (page 218 of the transcript) states:

"It is understood and agreed that the exclusive and unrestricted use of same by the government shall be executed concurrently, jointly and in common with the Lessor and its tenants."

This provision is also set forth in the decision of the Court of Claims, *Thomas Lee Causby and wife, Tenie Causby v. The United States*, 104 Court of Claims Report 342, 345 (1945).

Paragraph 11 of the lease (page 221 of the transcript) stipulates:

"Nothing in this lease is to prevent the continued operation of the Greensboro High Point Airport as an accredited C. A. A. public airport."

The record from the Court of Claims filed with your Honorable Court shows on page 8 of the transcript of record the following tabulation, which indicates the use of the airport by aircraft of civilian and military planes:

<i>Date</i>	<i>Airliner</i>	<i>Civilian itinerant</i>	<i>Civilian local</i>	<i>Military</i>	<i>Monthly total</i>
August 1943	242	289	2,584	1,576	4,691
September 1943	226	111	4,082	1,384	5,803
October 1943	256	115	3,647	1,598	5,656
November 1943	238	162	3,336	1,750	5,486
December 1943	232	147	3,892	1,542	5,813
January 1944	200	149	6,220	1,647	8,216
February 1944	184	112	854	1,552	2,702
Total 7 months' period	1,578	1,125	24,615	11,049	38,367

Argument.

This is incorporated in No. 8 of the Special findings of fact made by the Court of Claims (104 Court of Claims Reports 342, 347).

From the above tabulation, it is evident that less than one out of every three flights from the airport were made by aircraft of the United States, yet the Supreme Court did not find that the Greensboro High Point Authority was liable in eminent domain proceedings to the plaintiffs in that case.

Implicit in the opinion is that the airport operator was not liable since it was not the efficient cause of the injury. For this reason it was felt that the opinion of the Pennsylvania Supreme Court clearly focuses possibility of liability on the actual aircraft rather than the owner of the airport from which they emanate.

In addition, it should be pointed out that it was not until the passage of the Federal Tort Claims Act of 1946 Aug. 2, 1946, Ch 753, title IV, 60 Stat 842 28 U.S.C.A. 1346 that the United States became liable in tort. Hence, at the time of the *Causby* case the only possible remedy that the plaintiffs had was a suit under the Tucker Act March 3, 1897, ch 359, 24 Stat 505, raising the constitutional issue of the Fifth Amendment and involving an actual expropriation of property. The plaintiffs in the *Causby* case and in this case are in exactly opposite positions. In the *Causby* case, the remedy in tort was not possible and plaintiffs had a remedy only in eminent domain proceedings. In the present case, the Pennsylvania Supreme Court has indicated there is no remedy in eminent domain proceedings but has explicitly preserved the plaintiffs' right to proceed under State law for torts against the

Argument.

airlines. But in both cases, the position of the airport operator is the same and in both cases the courts have not left the plaintiffs without a remedy. Hence, how can the plaintiff in this case claim that he is deprived of property without due process of law, at least at this juncture?

If the position of the plaintiff be accepted that the County is liable for a taking of property and has exercised its right of eminent domain over property adjoining the airport by reason of its construction of the airport an intolerable and unreasonable burden would be placed upon the County of Allegheny and other municipal and public airport operators and owners.

It must be noted that County of Allegheny not only does not own or operate or control the planes going in and out of the Greater Pittsburgh Airport, as has been pointed out by the Supreme Court of Pennsylvania, but neither does it, nor can it, select the number of planes used by the commercial airlines, the types of planes, whether they are motor-driven or jet powered, whether they are heavy or light, whether they are quiet or noisy, or whether they can navigate the runways at the airport in a more or less horizontal or vertical fashion. These things are all within the control of the commercial airlines to whom the County has leased the facilities at the airport. It is not the County of Allegheny but the Federal government which certifies the type, size, noise characteristics, etc., of the planes that use the County's airport.

All flights of aircraft are governed by the Federal government, and the County of Allegheny has no right

Argument.

to determine or direct the altitude of flights in and out of the Greater Pittsburgh Airport. There has never been any allegation or charge that the Greater Pittsburgh Airport does not meet the legal requirements set up by the Federal Government or that the Airport is not large enough. Plaintiff's property is situate approximately 3100 feet from the end of the northeast runway. Should the Federal Government issue new regulations, as has frequently been done in the past, changing the pattern of flight or the angle of ascent or descent, planes would of necessity have to fly over property much further away from the end of the runway and at lower altitudes than they now fly.

In the usual case of exercising the right of eminent domain, the condemning party, whether a municipality, County or other agency, determines in the first instance what property is to be taken. Estimates of the amount of damages, of necessity, must be made. Even though estimates may vary and judicial determinations may change these estimates, the condemning body has within its power the right to determine what property shall be taken for public purposes. The amount of damages to be paid may subsequently be determined in judicial proceedings, but the damages are *only* for the property which has been appropriated by the public body. Under the contentions of the plaintiff the taking of property would depend *not upon the action of the County* but upon the action of some *other* public body, in this case, the *United States of America*, over whose action the County of Allegheny would have no control. The County may have decided to take 2,000 acres of land for the purpose of constructing an airport and then find, by reason of a change in regulations at some subsequent period, that it

Argument.

has "taken" property miles away from the airport and that such "taking" was effected by the County *without* any official action and without its *knowledge*. No public body, under such circumstances, could undertake the construction of an airport since the cost of owning and operating such an airport would be limitless and beyond the control of the governing body.

V. Where a State Court Has Decided That Certain Acts Do Not Constitute a Taking Under the Laws and Constitution of the State, Such Determination Should Not Be Overruled by the Supreme Court of the United States.

Where a state court has determined that certain acts do not under the laws and constitution of the state constitute a taking, injury or destruction of property, this Court has in the past indicated that it should not be tempted to substitute its opinion for that of the state court: *Marchant v. Pennsylvania Railroad*, 153 U.S. 380 (1894), and *Sauer v. New York*, 206 U.S. 536 (1907). This Court held in the *Marchant* case, at page 385:

"The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having first been made or secured, involves certain questions of fact . . . But it was adjudged by the Supreme Court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and constitution of the State, constitute a taking, an injury, or a destruction of the plaintiff's property.

"We are not authorized to inquire into the grounds and reasons upon which the Supreme Court

Argument.

of Pennsylvania proceeded in its construction of the statutes and constitutions of that State, . . .

"But we are urged to sustain and exercise our jurisdiction in this case because it is said that the plaintiff's property was taken 'without due process of law,' . . .

"It is sufficient for us in the present case to say that, even if the plaintiff could be regarded as having been deprived of (p. 386) her property, the proceedings that so resulted were in 'due process of law.'

"The plaintiff below had the benefit of a full and fair trial in the several courts of her own State, whose jurisdiction was invoked by herself. In those courts her rights were measured, not by laws made to affect her individually, but by general provisions of law applicable to all those in like condition."

In the *Sauer* case, at pp. 547-548 of 206 U. S., this Court pointed out that there was no lack of due process in State court proceedings which determined that the plaintiff's property had not been taken and that "such question must be for the final determination of the state court".

Even if the *Marchant* and *Sauer* cases are considered no longer to be the law, it is to be noted that the present case differs from both the *Marchant* and *Sauer* cases in one important respect. In those cases, the identity of the body which had allegedly condemned the property of plaintiff was clear. In the present case the Supreme Court of Pennsylvania has not decided whether there has been damage to plaintiff's property either tor-

Argument.

tious or otherwise. All that it has decided is that under State law, whether there has been a taking or not the County of Allegheny has no liability under the facts. It is submitted that this is peculiarly a question of State law for the determination of the State court. Surely, this Court does not wish to tell the fifty states that under their State laws and constitutions an airport operator must in all cases be liable in eminent domain proceedings to adjoining property owners regardless of the facts and of the actions of others whom the airport operator cannot control, and thus mandate to those fifty states who shall be liable and that such liability shall be *only* in eminent domain proceedings in the *State* courts.

*Conclusion.***CONCLUSION**

It is clear from the record that the County took no official action that would give rise to a taking of plaintiff's property.

It seems equally clear that the *Causby* case provides no support for plaintiff's contention that there is a taking by the County without official action. Not only was the *Causby* case directed against those who own, operate or control the aircraft involved . . . *not the airport owner* . . . but factually, plaintiff has not presented a case which falls within the *Causby* principle.

Plaintiff's argument that the remedy provided by the Pennsylvania Supreme Court is illusory is without foundation, in view of the fact that there is open to the plaintiff, not only the tort actions adverted to by the Pennsylvania Supreme Court, but actions available to the plaintiff under the regulations of the Federal Aviation Agency. In addition, there is presently pending an equity suit by plaintiff.

For the above reasons, as well as others set forth in the preceding argument, it seems apparent that this case does not present any Federal constitutional issue.

Therefore, it is respectfully submitted that the decision of the Pennsylvania Supreme Court be affirmed.

MAURICE LOUIK
County Solicitor

FRANCIS A. BARRY
First Asst. County Solicitor

PHILIP BASKIN
Special Counsel

APPENDIX

Grant Agreement

Date of Offer: June 7, 1948

Greater Pittsburgh Airport

Project No. 9-36-029-801

**To: The County of Allegheny, Pennsylvania
(herein referred to as the "Sponsor")**

**FROM: The United States of America (acting through
the Administration of Civil Aeronautics, herein referred to as the (Administrator"))**

WHEREAS, The Sponsor has submitted the Administrator a Project Application dated February 27, 1948, for a grant of Federal funds for a project for the Greater Pittsburgh Airport (herein called the "Airport") and a Sponsor's Assurance Agreement adopted by the Sponsor under date of January 13, 1948, relating to the operation and maintenance of said Airport, together with plans and specifications for such project, which Project Application and Sponsor's Assurance Agreement are hereby specifically incorporated herein and made a part hereof; and

WHEREAS, The Administrator has approved a project for development of the Airport (herein called the "Project") consisting of the following described airport development:

Grading, drainage and paving of taxiways "S" and "T" and of plaza entrance to terminal building; fine grading and paving of loading apron area adjacent to south dock of terminal building; water connection to terminal building and water lines for fire control

Grant Agreement.

in loading apron area; electrical underground conduits and gasoline lines under entrance plaza; power house including general contract, electrical and mechanical contracts, excluding boilers but including boiler auxiliaries and underground concrete oil storage bunkers; gasoline lines and service drive to power house;

all as more particularly described in the plans and specifications approved by the Administrator or his duly designated representative, which plans and specifications are incorporated herein and made a part hereof;

NOW, THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Federal Airport Act (60 Stat. 180; Pub. Law 377, 79th Congress), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Project Application and Sponsor's Assurance Agreement, and its acceptance of this offer, as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport, as herein provided,

THE ADMINISTRATOR, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States' share of costs incurred in accomplishing the Project, 50 percentum of all allowable project costs, subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be \$650,000.00.
2. The Sponsor shall:

Grant Agreement.

- (a) begin accomplishment of the Project within a reasonable time after acceptance of this Offer, and
 - (b) carry out and complete the Project in accordance with the terms of this Offer and the Federal Airport Act and the Regulations promulgated thereunder by the Administrator in effect on the date of this Offer, which Act and Regulations are incorporated herein and made a part hereof, and
 - (c) carry out and complete the Project in accordance with the plans and specifications incorporated herein as they may be revised or modified with the approval of the Administrator or his duly authorized representative.
3. The Sponsor shall operate and maintain the Airport as provided in the Sponsor's Assurance Agreement incorporated herein.
 4. Any misrepresentation or omission of a material fact by the Sponsor concerning the Project or the Sponsor's authority or ability to carry out the obligation assumed by the Sponsor in accepting this Offer shall terminate the obligations of the United States, and it is understood and agreed by the Sponsor in accepting this Offer that if a material fact has been misrepresented or omitted by the Sponsor, the Administrator on behalf of the United States may recover all grant payments made.
 5. The Administrator reserves the right to amend to withdraw this Offer at any time prior to its acceptance by the Sponsor.

Grant Agreement.

This Offer shall expire and the United States shall not be obligated to pay any of the allowable costs of the Project unless this Offer has been accepted by the Sponsor within 60 days from the above date of Offer or such longer time as may be prescribed by the Administrator in writing.

(a) It is hereby understood and agreed that the Sponsor will not advertise for bids, award any contract or commence any construction work in connection with the project and that the United States will not make, nor be obligated to make, any payment under this Grant Agreement, until final plans and specifications have been submitted to and approved by the Administrator.

(b) It is understood and agreed by the parties hereto that the United States will not make, nor be obligated to make, any payment under this Grant Agreement until an Agency Agreement, entered into between the Pennsylvania Aeronautics Commission and the County of Allegheny, Pennsylvania, pursuant to the provisions of Act No. 53 of the Pennsylvania Laws, 1947, has been submitted to and approved by the Administrator as being consistent with the terms and conditions of this Grant Agreement. It is further understood and agreed that such Agency Agreement, as approved by the Administrator, will not be amended, modified or terminated without the prior written approval of the Administrator or his duly designated representative.

Grant Agreement.

The Sponsor's acceptance of this Offer and ratification and adoption of the Project Application and Sponsor's Assurance Agreement incorporated herein shall be evidenced by execution of this instrument by the Sponsor as hereinafter provided, and said Offer and acceptance shall comprise a Grant Agreement, as provided by the Federal Airport Act, constituting the obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA

THE ADMINISTRATOR OF CIVIL AERONAUTICS

By /s/ ORA S. YOUNG

Regional Administrator, Region I

Amendment to Grant Agreement.**Amendment to Grant Agreement****Greater Pittsburgh Airport****Allegheny County, Pennsylvania****Project No. 9-36-029-801**

WHEREAS, the Administrator of Civil Aeronautics has determined that, in the interest of the United States, the Grant agreement between the Administrator of Civil Aeronautics, acting for and on behalf of the United States, and the County of Allegheny, Pennsylvania, accepted by said County of Allegheny on the 22nd of June, 1948, should be amended as hereinafter provided:

NOW, THEREFORE, WITNESSETH:

That, in consideration of the benefits to accrue to the parties hereto, the Administrator of Civil Aeronautics, on behalf of the United States, on the one part, and the County of Allegheny, Pennsylvania, on the other part, do hereby mutually agree that the Grant Agreement accepted by the Sponsor under date of June 22, 1948, be and the same is hereby amended by adding thereto as paragraph 8 of the following provisions:

- 8. (a) It is hereby understood and agreed that the Sponsor's Assurance Agreement incorporated in and constituting part of this Grant Agreement is hereby amended by deleting subsections (b) through (c) of Section 1 thereof, and inserting in lieu thereof the following:**

"(b) These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal-aid for the Project or any portion thereof,

Amendment to Grant Agreement.

made by the Administrator, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance of an offer of Federal aid for the Project.

- (c) The Sponsor will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds and classes of aeronautical use without discrimination between such types, kinds and classes: Provided, That the Sponsor may establish such fair, equal and non-discriminatory conditions to be met by all users of the Airport as may be necessary for the safe and efficient operation of the Airport: And provided further, That the Sponsor may prohibit any given type, kind or class of aeronautical needs of the area served by the Airport.
- (d) The Sponsor will not exercise, grant or permit any exclusive right for the use of the Airport forbidden by section 303 of the Civil Aeronautics Act of 1938, as amended. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will not either directly or indirectly exercise, or grant to any person, firm or corporation, or permit any person, firm, or

Amendment to Grant Agreement.

corporation to exercise, any exclusive right for the use of the Airport for commercial flight operations, including air carrier transportation, rental of aircraft, conduct of charter flights, operation of flight schools or the carrying on of any other service or operation requiring the use of aircraft.

- (c) The Sponsor agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms and without unjust discrimination. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees:

(1) That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to render any service or furnish any parts, materials, or supplies (including the sale thereof) essential to the operation of aircraft at the Airport, the Sponsor will insert and enforce provisions requiring the contractor:

(a) To furnish good, prompt and efficient service adequate to meet all the demands for its service at the Airport,

(b) To furnish said service on a fair, equal and non-discriminatory basis to all users thereof, and

(c) To charge fair, reasonable and non-discriminatory prices for each unit of

Amendment to Grant Agreement.

sale or service: Provided, That the contractor may be allowed to make reasonable and non-discriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

- (2) That it will not exercise or grant any right or privilege which would operate to prevent any person, firm, or corporation operating aircraft on the Airport from:**
- (a) Performing any service on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform,**
 - (b) Purchasing off the Airport and having delivered on the Airport without entrance fee, delivery fee or other surcharge for delivery any parts, materials or supplies necessary for the servicing, repair or operation of its aircraft: Provided, That the Sponsor may make reasonable charges for the cost of any service (including charges for maintenance, operation and depreciation of facilities and rights-of-way) furnished by the Sponsor in connection with the delivery of any parts, materials or supplies: And provided further, That in case of aviation gasoline and oil purchased off the Airport and delivered to the Airport, the Spon-**

Amendment to Grant Agreement.

sor may require the aviation gasoline and oil to be stored in specified places, limiting the amount delivered to the amount of storage space available, and if necessary for the safe and efficient operation of the Airport, require persons furnishing their own aviation gasoline and oil to utilize such storage, dispensing and delivery system as the Sponsor may designate.

- (3) That if it exercises any of the rights or privileges set forth in subsection (1) of this paragraph it will be bound by and adhere to the conditions specified for contractors set forth in said subsection (1).
- (f) Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of non-aviation products and supplies or any service of a non-aeronautical nature.
- (g) The Sponsor will suitably operate and maintain the Airport and all facilities thereon or connected therewith which are necessary for airport purposes other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for aeronautical purposes: Provided, That nothing contained herein shall be construed to require that the Airport be operated and maintained for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere substantially

Amendment to Grant Agreement.

with such operation and maintenance. Essential facilities, including night lighting systems, when installed, will be operated in such a manner as to assure their availability to all users of the Airport.

- (h) To the extent of its financial ability, the Sponsor will replace and repair all buildings, structures, and facilities developed under the Project which are destroyed or damaged, replacing or restoring them to a condition comparable to that preceding the destruction or damage, if such buildings, structures, and facilities are determined by the Administrator to be necessary for the normal operation of the Airport.
- (i) Insofar as is within its powers and reasonably possible, the Sponsor will prevent the use of any land either within or outside the boundaries of the Airport in any manner (including the construction, erection, alteration, or growth of any structure or other object thereon) which would create a hazard to the landing, taking-off or maneuvering of aircraft at the Airport, or otherwise limit the usefulness of the Airport. This objective will be accomplished either by the adoption and enforcement of a zoning ordinance and regulations or by the acquisition of easements or other interests in lands or airspace, or by both such methods. With respect to land outside the boundaries of the airport, the Sponsor will also remove or cause to be removed any growth, structure, or other object thereon which would be a hazard to the landing,

Amendment to Grant Agreement.

taking-off, or maneuvering of aircraft at the Airport, or if such removal is not feasible, will mark or light such growth, structure, or other object as an airport obstruction or cause it to be so marked or lighted. The airport approach standards to be followed in performing the covenants contained in this paragraph shall be those established by the Administrator in Office of Airports Drawing No. 672 dated September 1, 1946, unless otherwise authorized by the Administrator.

- (j) All facilities of the Airp developed with Federal aid and all those usable for the landing and taking-off of aircraft will be available to the United States at all times, without charge, for use by military and naval aircraft in common with other aircraft, except that if the use by military and naval aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. The amount of use to be considered "substantial" and the charges to be made therefor shall be determined by the Sponsor and the using agency.
- (k) The Sponsor will furnish to any civil agency of the United States, without charge (except for light, heat, janitor service, and similar facilities and services at the reasonable cost thereof), such space in airport buildings as may be reasonably adequate for use in connection with any airport air traffic control activities, weather-reporting activities, and communications activi-

Amendment to Grant Agreement.

ties related to airport air traffic control, which are necessary to the safe and efficient operation of the Airport and which such agency may deem it necessary to establish and maintain at the Airport for such purpose.

- (l) After completion of the Project and during the term of these covenants, the Sponsor will maintain a current system of Airport accounts and records, using a system of its own choice, sufficient to provide annual statements of income and expense. It will furnish the Administrator with such annual or special Airport financial and operational reports as he may reasonably request. Such reports may be submitted to the Administrator on forms furnished by him, or may be submitted in such other manner as the Sponsor elects, provided the essential data are furnished. The Airport and all airport records and documents affecting the Airport, including deeds, leases, operation and use agreements, regulations, and other instruments, will be available for inspection by any duly authorized representative of the Administrator upon reasonable request. The Sponsor will furnish to the Administrator, upon request a true copy of any such document.
- (m) The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency

Amendment to Grant Agreement.

eligible under the Act and the regulations to assume such obligations and having the power, authority and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the Airport by any agency or person other than the Sponsor or an employee of the Sponsor, the Sponsor will reserve sufficient powers and authority to insure that the Airport will be operated and maintained in accordance with the Act, the Regulations, and these covenants.

- (n) The Sponsor will maintain a master plan (layout) of the Airport having the current approval of the Administrator. Such plan shall show building areas, approach areas, and landing areas, indicating present and future proposed development. The Sponsor will conform to such master plan (layout) in making any future improvements or changes at the Airport which, if made contrary to the master plan (layout), might adversely affect the safety, utility, or efficiency of the Airport."

and by renumbering subsection (p) of said Section 1, subsection (o).

Amendment to Grant Agreement.

IN WITNESS WHEREOF, the parties hereto have hereby caused this amendment to said Grant Agreement to be duly executed as of the 21st day of September, 1948.

UNITED STATES OF AMERICA
Administrator of Civil
Aeronautics

BY ORA W. YOUNG
Regional Administrator,
Region I
ALLEGHENY COUNTY,
PENNSYLVANIA

BY JOHN J. KANE
Title [SEAL]
Chairman Board of
County Commissioners

Attest: M. N. SNYDER
Title: Chief Clerk

CERTIFICATE OF SPONSOR'S ATTORNEY

I, NATHANIEL K. BECK, acting as Attorney for the County of Allegheny, Pennsylvania, do hereby certify:

That I have examined the foregoing Amendment to Grant Agreement and the proceedings taken by said County of Allegheny, Pennsylvania, relating thereto, and find that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Pennsylvania, and further that, in my opinion, said Amendment to Grant Agreement constitutes a legal and binding obligation of the County of Allegheny, Pennsylvania, in accordance with the terms thereof. Dated at Pittsburgh, Pa., this 25th day of September, 1948.

NATHANIEL K. BECK
Title: County Solicitor

*Air Traffic Rules.***Air Traffic Rules—Minimum Safe Altitudes of Flight****UNITED STATES OF AMERICA****CIVIL AERONAUTICS BOARD****Washington, D. C.****Civil Air Regulations, Part 60****Interpretation No. 1****Adopted: July 22, 1954**

In the Civil Policy Report of the Air Co-ordinating Committee, released by the President under date of May 26, 1954, the following policy statement appears:

"Existing federal regulations relating to minimum altitudes of flight should be re-examined by the appropriate agencies to determine whether revision of such regulations is necessary or desirable in order to dispel any possible inference that the federal government has not exercised its regulatory jurisdiction over the entire flight of an aircraft in the airspace above the United States navigable in fact."

The textual material that accompanies this policy statement indicates that the re-examination called for is desirable because of doubts which have been expressed as to whether current minimum safe altitude regulations of the Board specifically apply to aircraft while landing or taking off. Directly involved is the question whether the airspace which lies at and above the flight path of aircraft making normal take-offs and landings comes within the term "navigable airspace" as defined in the Civil Aeronautics Act. If it does a public right of freedom of transit is recognized and proclaimed to exist for citizens of the United States by section 3 of that Act.

Air Traffic Rules.

The current minimum safe altitudes for flight, so far as here pertinent, are set forth in §60.17 of the Civil Air Regulations, and read as follows:

"§60.17. *Minimum safe altitudes.* Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes:

"(a) *Anywhere.* An altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface;

"(b) *Over congested areas.* Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. Helicopters may be flown at less than the minimum prescribed herein if such operations are conducted without hazard to persons or property on the surface and in accordance with paragraph (a) of this section; however, the Administrator, in the interest of safety, may prescribe specific routes and altitudes for such operations, in which even helicopters shall conform thereto;

"(c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. Helicopters may be flown at less than the minimums prescribed herein if such operations are conducted without hazard to persons or property on the sur-

Air Traffic Rules.

face and in accordance with paragraph (a) of this section."

The particular part of the regulations to which this interpretation relates is that contained in the initial clause of the section: "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes". Is this to be read as establishing a rule prescribing a changing but continuously effective minimum altitude for each instant of the climb after take-off and approach to landing; or is it simply an exception to the general minimum altitude rule, relieving the pilot of the obligation of complying therewith on his way up to and down from the higher reaches?

In accordance with the recommendation of the Air Coordinating Committee, the Board has reviewed these minimum safe altitude regulations, taking into consideration past regulations on the subject, the legislative intent of the Congress, the powers and duties of the Board in this field, and the technical aspects of aircraft operation. In arriving at its conclusion that the revision of this aspect of its minimum altitude rules is neither necessary nor desirable, the Board does so because in its opinion the application of the rule as herein interpreted is productive of optimum safety in landing and take-off operations. This was so at the time the rule was promulgated. It remains so now.

In arriving at its interpretation of the current regulation the Board considers that the following factors are the ones which should be taken primarily into account:

(a) The legislative history of the Air Commerce Act of 1926 shows that the Congress intended the navi-

Air Traffic Rules.

gable airspace to extend down to the surface at airports. The regulation should therefore be interpreted so as to give effect to this expression of Congressional intent, if such an interpretation is possible.

(b) The duty of the Board under the Act is primarily to prescribe safe altitudes of flight, not to proclaim what is navigable airspace. Although navigable airspace has been defined by the Congress in terms of minimum altitudes, these must be fixed by the Board solely on the basis of safety.

(c) The matter of safety of flight in terms of safe altitudes is dependent upon many variables including the type of aircraft flown, the weather conditions at the time, and the terrain below. An altitude which may be wholly safe and desirable for cruising flight at one time for one aircraft may be wholly unsafe for it under different conditions, or for other aircraft under the same conditions. For these reasons, minimum safe altitudes for flight cannot be described with the geometrical particularity of a conveyance. As a consequence the overriding minimum safe altitude rule is phrased in terms of performance of the particular aircraft related to the terrain below—or that “altitude which will permit, in the event of the failure of a power unit, an emergency landing without undue hazard to persons or property on the surface”.

(d) Landing and take-off operations require special treatment. This need arises by reason of the slanting nature of the flight path. However, as in the case of the en route rules, maximum safety may be achieved only by relating the requirement to the particular performance capabilities of the aircraft under existing conditions. It is true that, in the case of some airports, full compliance

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with the en route minimum altitude rules is possible even during landing or take-off; in many others, however, particularly in the case of those airports close to urban centers, compliance with the en route rules is not possible, and the Board's safety concern therefore lies in getting aircraft on and off such airports and up to and down from cruising altitude with the greatest degree of safety. Because of individual variations in aircraft performance, this goal of maximum safety cannot be achieved by a metes and bounds description of airspace surrounding airports applicable to all aircraft alike, or by a uniform formula prescribing a given angle of climb and descent. Any such fixed requirement might be appropriate to the performance capabilities of some aircraft, unduly lax with respect to others, and impossible of achievement by others. Either a meaningless average would have to be struck, or a minimum requirement fixed which could be met at all times by every aircraft possessing an airworthiness certificate. In either case the Board would not be fulfilling its obligation under the Act to provide safe altitudes of flight. To achieve the proper high level of safety, it is vital that every pilot, consistently with sound and conservative operating practices, take full advantage of the performance capabilities of his aircraft so as to spend as little time as possible at altitudes below the minimums established for cruising flight. The "when necessary" language used in current §60.17 achieves this result simply and directly. It prohibits low altitude flying except when a departure from the otherwise applicable minimum is necessary for landing or taking off. It prohibits unnecessary low flying during the execution of those maneuvers. At every point along the proper flight path for approach to landing or climb after take-

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off, an unnecessary dip would place the pilot in potential violation of this regulation. In effect, it requires the pilot to do the best he can consistently with sound flying practice and the machine at his disposal to avoid unduly prolonged low flight.

(e) Possibly other formulae could be devised which express the same standard of safety in specific terms of minimum altitudes linked to the normal and necessary downward or upward flight path of the particular airplane under the particular conditions. In this connection it makes no difference whether the prescribed minimum flight path is described directly by reference to the ground below or whether it is fixed in relation to the minimum en route altitudes which themselves have been ascertained by reference to the surface. In adopting this second solution, §60.17 fixes the flight path in terms of permissible deviation from the otherwise applicable norm. It applies the standard of necessity to accomplish specified ends and in so doing produces the maximum flight paths for climb and descent that are consistent with the safest operating techniques and practices. However worded, no other formula could do more or do it better.

In consideration of the foregoing, the Board construes the words "Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes" where such words appear in §60.17 of the Civil Air Regulations, as establishing a minimum altitude rule of specific applicability to aircraft taking off and landing. It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach

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to land. Since this provision does prescribe a series of minimum altitudes within the meaning of the Act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace.

(Sec. 205 (a); 52 Stat. 984; 49 U.S.C. 425 (a). Interpret or apply 601 (a); 52 Stat. 1007; 49 U.S.C. 551a)).

By the Civil Aeronautics Board:

/s/ M. C. Mulligan
Secretary

(SEAL)

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Supreme Court of the United States

OCTOBER TERM 1961

No. 81

THOMAS N. GRIGGS, *Petitioner*,

v.

COUNTY OF ALLEGHENY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA

BRIEF OF AMICUS CURIAE,
THE PORT OF SEATTLE, a municipal corporation

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Seattle 4, Washington.

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BOGLE, BOGLE & GATES

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No. 81

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
PENNSYLVANIA

**BRIEF OF AMICUS CURIAE,
THE PORT OF SEATTLE, a municipal corporation**

To the Honorable Justices of the Supreme Court of the
United States:

**STATEMENT OF INTEREST OF AMICUS CURIAE,
PORT OF SEATTLE, a municipal corporation**

Your amicus curiae is the owner and operator of the Seattle-Tacoma International Airport constructed and maintained pursuant to the Federal Airport Act of May 13, 1946 (49 U.S.C.A. § 1101 *et seq.*) as part of a "Federal-aid airport program aimed at the establishment of a nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics." 1948 U.S. Code Cong. Service, p. 1469. The interest of your amicus curiae is identical with that of respondent in respect to claims of subjacent property owners, who positioned as petitioner, seek damages against the Port

of Seattle for a "taking" of air space above their property by aircraft flying at low altitudes in taking-off and landing at the airport. The claim of said property owners involves some 250 plaintiffs whose claims run into the millions of dollars threatening the economic welfare of the Port of Seattle. The case of *United States v. Causby*, 328 U.S. 256, sometimes referred to herein as "*Causby*," followed in *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664, has established an unrealistic precedent of airport liability to nearby property owners whose property is subjected to noise and disturbance from commercial aircraft flying low over their property after taking-off or before landing at the airport. More than 200 plaintiffs have recently instituted action against the Port of Seattle upon a theory that the institution of scheduled jet aircraft service, as distinguished from propeller-driven aircraft, created a new cause of action based on a "taking," as a result of frequent low flights of jet aircraft over their property during take-offs and landings at the airport. These suits in the jet age are supported by the decision in *Highland Park, Inc. v. United States*, 161 F.Supp. 597, which decision followed *Causby*. The concern of your amicus curiae is the concern of every national airport in the United States, that if *Causby* is followed by the United States Supreme Court in the present case there would follow an unprecedented wave of litigation with an insurmountable financial burden placed upon public airports contrary to the public interest and welfare.

Your amicus curiae respectfully submits that the instant Writ of Certiorari to the Supreme Court of Pennsylvania should be denied for reasons which follow.

SUMMARY OF ARGUMENT

I.

There Can Be No "Taking" in a Constitutional Sense by a Public Airport

The declaration of a public right of flight in the navigable air space of the United States is a constitutional exercise of the power of Congress under the Commerce Clause, based on decisions of the Supreme Court giving a public easement of navigation in navigable waters. Congress having exercised that power, the property or interest that a property owner has in air space over his property is subservient to the dominant right of navigation. As a result there can be no "taking" of navigable air space in a constitutional sense. States and political subdivisions thereof cannot exercise any national right of eminent domain in navigable air space. Incidental damages for noise, vibrations and disturbances by aircraft as a result of a "taking" or exercise of power by Congress over navigable air space are non-compensable.

II.

There Was No "Taking" in a Constitutional Sense of Air Space Above the Petitioner's Property

There was no "taking" of petitioner's property in a constitutional sense. The petitioner's property is adjacent to the "approach zone" approved under the "Master Plan" by the Civil Aeronautics Administration, and hence below navigable air space used for take-off and landing of aircraft at the Greater Pittsburgh Airport. The respondent as "sponsor" under a Grant Agreement with the United States complied with all

rules and regulations of the Civil Aeronautics Administration. In doing so respondent acquired an adequate property interest for the project, and met the maximum requirements in acquiring "runway clear zones" in accordance with TSO-N-18, "Criteria for Determining Obstructions to Air Navigation." It conclusively appears that the air space above petitioner's property used by aircraft in taking off and landing at the airport was navigable air space and there was no "taking" of petitioner's property in the constitutional sense. Incidental damages for noise, vibrations and disturbance caused by aircraft using navigable air space is non-compensable as there was no physical invasion of petitioner's non-navigable air space.

III.

***United States v. Causby* Not Applicable**

The decision of the United States Supreme Court in *United States v. Causby*, 328 U.S. 256 is not controlling for (1) the United States in *Causby* conceded there would be a "taking" under the Fifth Amendment if the land were rendered uninhabitable, (2) the decision rested on a previous decision rendered prior to declaration by Congress that air space above the United States was part of the public domain and (3) the Congress has since made clear its intent that the term "navigable air space" includes that air space needed to insure safety in take-off and landing of aircraft.

ARGUMENT

I.

There Can Be No "Taking" in a Constitutional Sense of Air Space by a Public Airport

There can be no "taking" in a constitutional sense of navigable air space.

The declaration of Congress that the navigable air space of the United States is a public easement is a valid exercise of its powers under the commerce clause. *United States v. Causby* (1946) 328 U.S. 256, 260-61, 90 L.Ed. 1206, 1209-10; *Northwest Airlines, Inc. v. Minnesota* (1944) 322 U.S. 292, 303, 88 L.Ed. 1283, 1290; *Braniff Airways, Inc. v. Nebraska State Board* (1954) 347 U.S. 590, 98 L.Ed. 967.

In *Causby, supra*, the court stated:

"The United States relies on the Air Commerce Act of [May 20], 1926, 44 Stat. 568, c 344, 49 USCA § 171, 10A FCA title 49, § 171, as amended by the Civil Aeronautics Act of [June 23,] 1938, 52 Stat. 973 C 601, 49 USCA § 401, 10 A FCA title 49, § 401. Under those statutes the United States has 'complete and exclusive national sovereignty in the air space' over this country. 49 USCA § 176(a), 10A FCA title 49, § 176(a). They grant any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable air space of the United States.' " (328 U.S. at 260-61)

In *Northwest Airlines, Inc. v. Minnesota, supra*, the court stated:

"Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water." (322 U.S. at 303)

The public right of flight in the navigable air space of the United States owes its source to the same constitutional basis which, under decisions of the Supreme Court, has given rise to a public easement of navigation in navigable waters of the United States, *regardless of the ownership of the adjacent or subjacent soil*. H.R. Rep. No. 572, 69 Cong. 1st Session, p. 10; *Braniff Airways, Inc. v. Nebraska State Board* (1954) 347 U.S. 590, 596, 98 L.Ed. 967, 975.

The title or interest of the individual or state in air and subjacent land is subservient to the public right of navigation through the navigable air space of the United States. The owner of the land and improvements thereon holds the title subject absolutely to the public right of navigation as determined by Congress. The loss of the property or interest of the state or individual in the navigable air space is non-compensable because when the United States asserts its superior authority under the commerce clause to utilize navigable air space of the United States there is no "taking" in the sense of the Fifth Amendment. For the United States has a superior navigation easement which precludes private ownership of the navigable air space. *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 231-32, 4 L.Ed.2d 1186, 1188; *United States v. Chandler-Dunbar Water Power Co.* (1913) 229 U.S. 55, 62, 57 L.Ed. 1063, 1075; *Lewis Blue Point Oyster Cultivation Co. v. Briggs* (1913) 229 U.S. 85, 87, 57 L.Ed. 1083, 1085.

The "taking" of navigable air space, being analogous to the "taking" of navigable waters for purposes and

uses of navigation and commerce, is therefore "without liability, for remote or consequential damages."

Jackson v. United States (1913) 230 U.S. 1, 23, 57 L.Ed. 1363, 1374.

There can be no vested rights in a subjacent property owner to navigable air space above his lands for it is within the power of Congress to determine when it shall exercise its full power over the air space of the United States.

In *Gilman v. Philadelphia* (1866) 3 Wall. (US) 713, 724, 18 L.Ed. 96, 99, the court stated:

"It is for Congress to determine when its full power shall be brought into activity, and as to the regulation and sanctions which shall be provided."

Congress having declared that the air space above the United States is part of the public domain and having proclaimed that every citizen has a right of transit through the navigable air space of the United States, precludes the states, municipalities and political subdivisions from exercising the right of public domain in respect to navigable air space.

In *Pollard v. Hagan* (1845) 3 How. (US) 212, 230, 11 L.Ed. 565, 574 (quoted with approval in *Gilman v. Philadelphia* (1866) 3 Wall. (US) 713, 726, 18 L.Ed. 93, 100, the court stated:

"But in the hands of the states this power [eminent domain] can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution."

The right of respondent to acquire "runway clear

zones" is not in conflict with the exercise of the power of Congress over the navigable air space of the United States because of the obligation of a sponsor to acquire "runway clear zones" involving the surface of the land (14 C.F.R. § 550.38) with a right of ingress and egress to keep the clear zone free of obstructions. 14 C.F.R. § 550.38(e)(2).

II.

There Was No "Taking" in the Constitutional Sense of Air Space Above the Petitioner's Property

The petitioner's property is about one-half mile distant from the northeast-southwest runway of the Greater Pittsburgh Airport (R. 4), and subjacent to the "approach zone" established by the Civil Aeronautics Board in respect to said runway (R. 4). The petitioner describes this "approach zone" as sloping upward at the rate of one (1) foot vertically for each forty (40) feet horizontally (R. 4). The petitioner's residence is not only below the "approach zone" but is 420 feet easterly of the projected center line of the runway (R. 32). Therefore, aircraft in taking off and landing are 420 feet westerly of petitioner's house, as takeoff and landing requires a straight line of flight.

The aforesaid approach area was in compliance with the "Rules and Regulations of the Civil Aeronautics Administration" and established with its approval (R. 32). All flights of aircraft in the approach zone above petitioner's land were regulated by the Civil Aeronautics Administration and no flights were shown to be in violation of any regulation nor to be lower than necessary for a safe landing or a safe takeoff (R. 49).

As there was no physical invasion of petitioner's air space below the approach zone but only flights through air space needed to insure safety in take-off and landing of aircraft, all flights were within the meaning of the terms "navigable air space" as defined by Congress. Federal Aviation Act, 1958, § 101(24), 49 U.S.C.A. § 1301(24).

In meeting all requirements under the Federal Airport Act pursuant to a "Master Plan" approved by the Civil Aeronautics Administration, respondent acquired an "adequate property interest" in accordance with the regulations, 14 C.F.R. § 550.38(h)(3). This included acquiring an adequate property interest in runway clear zones, 14 C.F.R. § 550.38. More particularly there was a compliance with Technical Standard Order TSO-N-18 "Criteria for Determining Obstructions to Air Navigation," 14 C.F.R. § 550.38(c)(4)(5)-(6). The "runway clear zones" are areas comprising the innermost portion of the runway approach areas as defined in TSO-N-18. See diagram on page 151, 14 C.F.R.—Aeronautics and Space (revised as of January 1, 1961) § 550.38(d)(1). Petitioner has failed to point out any obligation of the respondent to acquire any interest in land or air space other than that actually acquired by respondent for the airport proper and for the runway clear zone areas pursuant to 14 C.F.R. § 550.38. The property interest required of the sponsor by FAA is the area comprising "runway clear zones," 14 C.F.R. § 550.38.

There are no requirements under the Grant Agreement (R. 31, 32) or the Amendment to the Grant Agreement (R. 100, *et seq.*) between respondent and

the United States or required by rules or regulations which would make it necessary or authorize respondent to acquire any interest in land or air space other than set forth above. Nor has petitioner pointed out any such requirement. Likewise the respondent has complied with the law of Pennsylvania in providing "the necessary approach protection" by acquisition of property rights according to the FAA standards. The Pennsylvania Airport Zoning Act § 1563 (Petitioner's Br. 18, 42). Thus respondent has appropriated no property for public use in the constitutional sense in violation of the Constitution of the State of Pennsylvania, Art. 16, § 8 (Petitioner's Br. 38).

It conclusively appears that that part of the air space above petitioner's property and above the glide slope of the approach area which was "needed to insure safety in takeoff and landing of aircraft" at the Greater Pittsburgh Airport, was "navigable air space." 49 U.S.C.A. § 176, § 180, 14 C.F.R. § 60.17, as construed by Civil Air Regulation, Interpretation 1, 19 F.R. 4602, July 27, 1954 (14 C.F.R., revised as of January 1, 1960, pp. 1360-61); Federal Aviation Act of 1958, § 101(24), § 104, 49 U.S.C.A. § 1301, § 1304; *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.(2d) 752 (1947); *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.(2d) 812 (2nd Cir. 1956). The use of such air space by aircraft in taking off and landing at the airport, pursuant to the declaration of Congress under the Commerce Clause, did not constitute a "taking" in a constitutional sense. *United States v. Grand River Dam Authority* (1960) 363 U.S. 229, 232, 4 L.Ed.(2d) 1186, 1188.

There having been no invasion in a physical sense of petitioner's non-navigable air space, the incidental damages caused by aircraft flying through the navigable air space arising from noise, vibrations, disturbances and the like are not compensable. *Richards v. Washington Terminal Co.* (1914) 233 U.S. 546, 58 L.Ed. 1088, cited in *United States v. Causby* (1946) 328 U.S. 256, 262, 90 L.Ed. 1206, 1210-11. *Causby* is distinguishable in that it was found there was an invasion of the *non-navigable air space*. The exercise by Congress of its power under the Commerce Clause in respect to use and extent of use of navigable air space by analogy to navigable waters, creates an immunity against incidental and consequential damages. *Jackson v. United States* (1913) 230 U.S. 1, 23, 57 L.Ed. 1363, 1374; *Nunnally v. United States*, 239 F.(2d) 521 (4th Cir. 1956).

III.

***United States v. Causby* Not Applicable**

United States v. Causby (1946) 328 U.S. 256, 90 L.Ed. 1206, is not applicable because (1) the United States in that case conceded there would be a "taking" in the sense of the Fifth Amendment if the flights were so low as to make the land uninhabitable, (2) the case was based on a previous decision of the Supreme Court rendered before Congress declared that air space above the United States was a part of the public domain and (3) it now appears that the intent of Congress was to include approach areas in take-off and landing of aircraft as a part of the navigable air space.

The *Causby* case was decided in 1946, and even then

may have been decided differently had not the United States on oral argument conceded there would be a "taking" under the Fifth Amendment "if the flights over respondent's property rendered it uninhabitable." The decision was based on *Portsmouth Harbor and Hotel Co. v. United States* (1922) 260 U.S. 327, 67 L.Ed. 287, a decision which arose nearly forty years ago and prior to the Air Commerce Act of 1926. This was prior to the exercise of the power of Congress declaring that all air space above the United States was part of the public domain. Both cases involved operations of the military in time of war, one missiles over a firing range, the other flights of military aircraft. This is the first time the court has been called upon to determine in peace time whether air space needed for navigation and commerce in taking off and landing at a public airport is navigable air space of the United States within the intent of Congress.

In passing the Federal Aviation Act of 1958 the definition of the term "navigable air space" was amended to include air space needed to insure safety in take-off and landing of aircraft. 1958 U.S. Code Cong. & Ad. News, p. 3751. The 1958 Act provided that all orders, determinations, rules, regulations, etc. by the Administrator of the Civil Aeronautics Authority and the Civil Aeronautics Board under any provision of law repealed and amended by the act which were previously in effect should continue in effect according to their terms until modified, terminated, superseded, set aside or repealed by the Administrator or the Board. 1958 U.S. Code Cong. & Ad. News, p. 944. One such order and determination promulgated in 1954 was the inter-

pretation by the Civil Aeronautics Board of Rule 60.17 (14 C.F.R. § 60.17) prescribing minimum safe altitudes of flight and construing the term "except when necessary for take-off or landing." The Board in its determination held "that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in a navigable air space," Civil Air Regulation Interpretation 1, 19 F.R. 4602, July 27, 1954 (14 C.F.R.—Aeronautics and Space, Rev. as of Jan. 1, 1960, at p. 1360). The courts, of course, at the time of *Causby* did not have the benefit of the official interpretation of the Civil Aeronautics Board when it dealt with the meaning of the terms "navigable air space" in reference to the then existing civil air regulations prescribing minimum altitudes of flight. That it was the intention of Congress that "navigable air space" should include that needed to insure safety in take-off and landing of aircraft now appears clear and what was said in *Causby* to the contrary is no longer applicable. Congress has now unmistakably declared that navigable air space includes *air space needed to insure take-off and landing of aircraft*. Federal Aviation Act of 1958, § 101(24), 49 U.S.C.A. § 1301(24). *The Genesee Chief* (1851) 12 How. (U.S.) 443, 456, 13 L.Ed. 1058, 1064, is authority for overruling *Causby* in the interest and advances of commerce.

It follows that *Ackerman v. Port of Seattle*, 55 Wn.(2d) 400, 348 P.(2d) 664 (1960), and *Highland Park v. United States*, 161 F.Supp. 597 (Ct. Cl. 1958), fall with *Causby*. *Ackerman* was not on the merits but only on declarations of the complaint. *Highland Park*

involved military jet bombers, and the United States conceded a "taking" of an avigation easement.

CONCLUSION

Navigable air space of the United States includes that air space needed to insure safety in take-off and landing of aircraft as defined in the Federal Aviation Act of 1958 and includes the "approach zone" prescribed by Technical Standard Order TSO-N-18—Criteria for Determining Obstructions to Air Navigation. The aircraft passing over petitioner's land in taking-off and landing at the Greater Pittsburgh Airport were at all times in "navigable air space" through which every citizen has a public right of transit. The petitioner is not entitled to compensation for a "taking" of the navigable air space above petitioner's land in the constitutional sense. Any depreciation of property petitioner may have suffered as from noise, vibration and other disturbance by aircraft in the use of navigable air space above his land is non-compensable. The petitioner, not being entitled to compensation for a "taking" or "damaging" of property in the constitutional sense, has not been denied due process under the Fourteenth Amendment.

Respectfully submitted,

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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner

v.

COUNTY OF ALLEGHENY

On Writ of Certiorari to the Supreme Court of
Pennsylvania

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

May it Please the Court:

Pursuant to Rule 24 (4) of your Honorable Court, Petitioner, Thomas N. Griggs, submits his Reply Brief to the Briefs for the County of Allegheny, Respondent; the Airport Operators Council (*amicus curiae*); and the Port of Seattle (*amicus curiae*).

The principal arguments advanced in opposition are (1) this Court should not consider the merits of the petition because the Petitioner is first required to exhaust state and federal remedies; (2) an immunity from all liability exists by reason of the federal statutes and regulations; and (3) the Causby case is inapplicable to the facts in Petitioner's case. While we believe they have presented nothing which is detrimental to our position, we shall reply briefly to each of the matters in the foregoing order.

Petitioner's Reply Brief.

L

Petitioner Is Not Required to Exhaust State and Federal Remedies

It is contended that the Petitioner, before the constitutional question can be resolved, is obligated to pursue the remedy suggested by the Supreme Court of Pennsylvania and/or apply for relief to the appropriate federal agency from the burden of the low flights over his property.

There would be some merit to this contention, (1) if the Petitioner's property were located elsewhere than on a glide path and there were frequent flights over it below the safe navigable airspace which were not necessary for landing or taking off at the airport; or, (2) if the Commonwealth of Pennsylvania had exclusive jurisdiction and control over the airspace in Pennsylvania and the low flights were in violation of Pennsylvania regulations. But neither is the fact; (1) the Petitioner's property is on a glide path which must be used for access to the airport, and (2) the federal government has exclusive jurisdiction and control over the airspace in the United States.

The assumed reliance upon the contended for application of the doctrines of exhaustion of available state and federal remedies, and the avoidance of untimely and premature resolution of constitutional questions pending exhaustion of these remedies, as precluding review of this petition on its merits, is misplaced in this case.

The Fourteenth Amendment imposes a constitutional limitation upon state actions; and specifically, the prohibition contained in the Fifth Amendment, as spelled out in the decisional law, requiring the federal govern-

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ment to pay just compensation for the taking of private property for public use, is grafted into the property due process concepts of the Fourteenth Amendment. *Panhandle Eastern Pipe Line Co. v. State Highway Comm. of Kansas*, 294 U.S. 613.

The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived by the state of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. *McCoy v. Union Elevated R. Co.*, 247 U.S. 354. The nature of this fundamental right was characterized in *Gibbes v. Zimmerman*, 290 U.S. 326, wherein it was stated at p. 332:

"... the appellant has no property in the constitutional sense in any particular form of remedy; all that is guaranteed by the Fourteenth Amendment is the preservation of his substantial *right to redress by some effective procedure.*" (Emphasis added).

Some reliance is placed upon *Dohany v. Rogers*, 281 U.S. 362, and the Petitioner is in agreement with the quotations as found in the Airport Operators' brief to the extent that they are read in the context of an admitted taking of private property by the state.

In the instant case the Supreme Court of Pennsylvania has held that one of the political subdivisions of the state, Allegheny County, did not take Petitioner's property, and suggests that the aggrieved property owner seek relief by prosecuting trespass actions against the individual airlines. The correctness of this decision is here challenged by the Petitioner as being in conflict with the prohibitions on state action contained in the

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Fourteenth Amendment property due process clause as given meaning by the Fifth Amendment and specifically the *Causby* decision.

The principal issue here raised is simple and narrow — was there state action, taking Petitioner's private property for a public use, within the meaning of the Fourteenth Amendment. The thrust of the exhaustion of remedies contention is, that in order to determine if there is prohibited state action, it is necessary first to prosecute individual civil trespass actions for each individual trespass, against each transgressing airline, in order to obtain "standing" to raise this violation of the Fourteenth Amendment.

The instant case is analogous to a situation where a municipality erects a public library or other public building on land near but not abutting on a public highway and the municipality has constructed a roadway leading therefrom to the public building on private land which it has not acquired by purchase or condemnation. Must the aggrieved property owners commence trespass actions against the bus lines and other public conveyances, (which do not have the power of eminent domain but hold certificates of public convenience and necessity), which transport the public to and from the public building in order thereafter to raise the question of whether there has been a taking of the private property by the municipality which does have the power of eminent domain? No cases have been cited which even suggest this most unusual contended for application of the doctrine of exhaustion of available remedies and we believe there are none.

It is equally violative of the Fourteenth Amendment, positing a taking, for the state to deny a substantial

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right to redress by some effective procedure, *Gibbes v. Zimmerman*, supra. It is interesting to observe the nature of the substantial right to redress, the exhaustion of which, the Respondent asserts, is necessary, in order to argue the merits of this petition. A discussion of this suggested remedy is found in Petitioner's brief, Argument II, and what is said there regarding the futility of private trespass actions against quasi-public carriers operating pursuant to Air Carrier Operating Certificates and federal regulations is highlighted in the *City of Newark, New Jersey, et al. v. Eastern Airlines, Inc. et al.*, 159 F. Supp. 750, a decision relied upon by the Respondent, wherein it is stated at page 760:

"There is no evidence that the planes which passed over the school were those of any one or more of the defendants. * * * There is no evidence which will support a determination that the frequent invasions were by the planes owned by any one or more of the defendants, a determination of fact essential to an adjudication that any one or more of the defendants was, or were, guilty of a trespass. The adjudication cannot rest on mere conjecture or speculation."

The short answer, in addition to what has been previously stated, to the contention that the doctrine of exhaustion of remedies requires seeking relief at the federal level, as was held in the *City of Newark* case, is, aside from the fact that that case did not basically present a glide angle type of invasion, that no amount of regulatory change short of an absolute ban on the use of this, one of the three runways, would be adequate or effective.

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II.

**There Is No Immunity Under Federal Statutes
and Regulations**

The argument is advanced that the flights of the aircraft are within the navigable airspace as defined by the federal statutes and regulations and are an exercise of the declared right of travel in airspace. That means, as is so blandly insisted by the Port Authority of Seattle, that the landowner is not entitled to receive just compensation for the taking of the airspace over his property, which he must have for his use and enjoyment of it, insofar as such taking is the result of authorized and necessary flights to accomplish a public purpose. That amounts to confiscation and we believe contravenes all concepts of the Fifth and Fourteenth Amendments to the Constitution of the United States as well as similar provisions in state constitutions.

Mr. Justice Holmes said in *Pennsylvania Coal Co. v. Mabon*, 260 U.S. 393, at pp. 415-416:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. * * *

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

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cut than the constitutional way of paying for the change. * * *

Again, in *Armstrong v. United States*, 364 U.S. 40, this Court said at page 48:

"The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. * * *

This same argument was advanced by the Government in the *Causby* case and definitely rejected by this Court. The several federal District Courts and the Court of Claims in the cases before them which involved glide path invasions have all rejected the contention and have uniformly followed *Causby* in awarding compensation for the "taking" of airspace for the flight over glide paths by government planes. The Supreme Court of Pennsylvania in this case decided this contention adversely to the Respondent, and the Supreme Court of Washington in *Ackerman v. Port of Seattle*, 349 P. 2d 664, in a lengthy and most thorough discussion likewise applied the doctrine of the *Causby* case and denied the Port Authority's effort to resist its effect.

The Respondent and amici curiae contend that the inclusion in the Federal Aviation Act of 1958, 49 U.S.C.A. §1301, subparagraph 24, affirms their position of immunity.¹

1. 'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this Act, and shall include airspace needed to insure safety in take-off and landing of aircraft. 72 Stat. 739.

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Mr. Justice Reed (Retired), sitting by designation in the Court of Claims, in the case of *Matson v. United States*, 171 F. Supp. 283, (1959), in awarding compensation for a taking, laid that argument to rest in the following language at pp. 285-286:

"In the Causby case, the path of glide was held not to be in the 'navigable airspace which Congress placed within the public domain,' at pages 263-266, of 328 U.S. at pages 1067 of 66 S. Ct. This conclusion was reached, although the then authorized regulation in use had a height exception for take-off and landing. And the Court determined:

'We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.' At p. 265 of 328 U.S. at page 1068 of 66 S. Ct.

"Today there is a different statute. We do not think, however, that the change in the definition of navigable airspace affects plaintiffs' causes of action. The Government's easement over plaintiffs' property may be perpetual. Although today navigable airspace with its public right of transit, 49 Stat. 740 §104, includes the glide, its use by the United States or other aeroplane operators at heights below the minimum altitudes of flight except where necessary for take-off or landing, may require compensation. The reasoning of the Causby case leads to this conclusion. It was there said:

"The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of

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the land itself.' At p. 265 of 328 U.S. at page 1068 at 66 S. Ct."

And in *United States v. 15,909 Acres, et al.*, 176 F. Supp. 447, Judge Yankwich, Chief Judge of the U. S. District Court (Southern District, California), made this pertinent observation with regard to that principle:

"... Regardless of any congressional limitations, the land owner, as an incident to his ownership, has a claim to the superadjacent airspace at such altitude as interferes with his enjoyment of the property and 'that invasions of it are in the same category as invasions of the surface.' *United States v. Causby*, 1946, 328 U.S. 256, 265, 66 S. Ct. 1062, 1068, 90 L.Ed. 1206."

III.

The Causby Doctrine Applies

The public use made of the airspace above and in close proximity to Petitioner's property situate in the path of glide imposes a servitude on Petitioner's property and results in a taking of the airspace. Liability for this taking rests entirely on the Respondent under the principles of the Causby case because the unavoidable public use of the airspace is made necessary to effect the public purpose for which the airport site was originally condemned and is presently maintained by the County. The contention that the Causby case does not fix liability on the airport operator ignores the principle that liability attaches as a result of public appropriation of private property in furtherance of a public need or purpose. (This principle is fully discussed on pages 18 to 21, inclusive, of our main brief with applicable citations.)

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In this case, public use is being made of the airspace to the same extent that the airspace in the Causby case was employed in the war effort. The public use here is for the operation of public air transportation facilities pursuant to the declared policy of the federal government to promote and encourage air commerce and the development of civil aeronautics. The character of the public use is the same in both cases and the fact that it is more readily discernible in the Causby case is a distinction without a difference. The several reasons advanced to minimize and limit the weight to be accorded to the Causby decision are deemed without merit and will not be discussed.

There was a taking by the Respondent on June 1, 1952.²

Respectfully submitted,

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Attorneys for Petitioner

2. Respondent questions the date of taking, namely, June 1, 1952. The Commissioners of Allegheny County on May 27, 1952, passed a resolution which provided for the opening of the airport for public use as of 12:01 a.m. June 1, 1952. Beginning on that date the airspace of the Petitioner became subject to be used for access to the Greater Pittsburgh Airport. The act of condemnation (in this case the resolution) in an eminent domain proceeding by a public body is that event to which "the taking" within the meaning of Article XVI, paragraph 8 of the Pennsylvania Constitution relates back after there has been an actual physical entry. *Lakewood Memorial Gardens, Inc. Appeal*, 381 Pa. 46, and cases therein cited.

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v.

COUNTY OF ALLEGHENY

On Writ of Certiorari to the Supreme Court of
Pennsylvania

**SUPPLEMENTAL CITATIONS TO PETITIONER'S
BRIEF AND REPLY BRIEF**

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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS, Petitioner

v.

COUNTY OF ALLEGHENY

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Pennsylvania**

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BRIEF AND REPLY BRIEF**

MAY IT PLEASE THE COURT:

Pursuant to Rule 41 (5) of your Honorable Court, Petitioner, Thomas N. Griggs, submits the following additional citations as a supplement to those found in his brief in chief and in his reply brief. The first citation was available to the petitioner prior to the filing of his brief in chief, but was not therein included, whereas the latter two citations are late citations which were unavailable to petitioner at the time of filing his brief in chief or his reply brief. Petitioner hereby requests leave of this Honorable Court to file these supplemental citations for consideration on the merits in this case. Examination of the following citations reveals that each supports

Supplemental Citations to Reply Brief.

petitioner's contention that the Pennsylvania Supreme Court erred in its decision in this case.

Recent Decisions, 22 University of Pittsburgh Law Review 786 (1961);

Note, *Griggs v. Allegheny County: Avigation Easements and Eminent Domain Proceedings*. 66 Dickinson Law Review 107 (1961);

Comments, 60 Michigan Law Review 98 (1961).

Respectfully submitted,

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IN THE
Supreme Court of the United States

NO. 81

OCTOBER TERM, 1961

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

PETITION FOR REHEARING

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PETITION FOR REHEARING

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The Petitioner, County of Allegheny, prays for a rehearing of the case decided by your Honorable Court on March 5, 1962, reversing the decision of the Pennsylvania Supreme Court. The far reaching effect of this decision in the development of national and international aviation could not be envisioned by your Petitioner when on June 5, 1961, certiorari was granted and that case transferred to the summary calendar for argument with the case of *Goldblatt v. Town of Hempstead*, 78 October Term, 1961. The effect of this action by your Honorable Court was necessarily to limit the extent of the issue which could be presented for oral argument.

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The decision of March 5, 1962, raises many complex issues that were not presented to your Honorable Court. The ramifications of this decision have elicited so much comment from and nationwide concern to all parties interested in the future of aviation in the United States that all interested parties, and in particular the United States, should be afforded an opportunity to present their positions upon all of the complex problems resulting from such decision.

Your Petitioner submits the following reasons in support of this Petition for Rehearing:

1. The decision of March 5, 1962, is at variance with the express intent of Congress that the Federal Government preempt the field of the use and control of the navigable air space and is also at variance with prior decisions of your court which hold that Federal statutes and regulations dealing with matters of vital national concern supersede any state activity in the same field.

2. The United States Government, which is a necessary party to these proceedings, has not participated in the conduct of the case before your court.

3. The decision of March 5, 1962, is at variance with the express holding in *U. S. v. Causby*, 328 U.S. 256.

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- I. The Decision of March 5, 1962, Is At Variance With the Express Intent of Congress that the Federal Government Preempt the Field of the Use and Control of the Navigable Air Space and Is Also At Variance With Prior Decisions of Your Court Which Hold that Federal Statutes and Regulations Dealing With Matters of Vital National Concern Supersede any State Activity In The Same Field.**

The express intent of Congress to preempt the field of air navigation in the United States is apparent from the provisions of the Civil Aeronautics Act, Pub. L. 85-726, Title I, § 101, Aug. 23, 1958, 72 Stat. 737, amended Pub. L. 87-197, § 3, Sept. 5, 1961, 75 Stat. 467 and its antecedent legislation.

In 49 U.S.C., § 1303, the administrator is mandated to consider among other things as being in the public interest:

"(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both."

49 U.S.C., § 1304 provides:

"There is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

The courts, prior to the decision of March 5, 1962, have construed this section as meaning that "airspace" through which an aircraft travels, takes off and lands, is in the public domain. *City of Newark, New Jersey, et al. v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (1958);

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Allegheny Airlines, Inc., et al. v. Village of Cedarhurst, et al., 238 F. 2d. 812.

The Committee on Interstate and Foreign Commerce, to whom the bill to create a Civil Aeronautics Board and a Federal Agency (S. 3880) was referred, stated (U.S. Code and Congressional and Administrative News, 1958 85th Congress 2d. Session) in its discussion at page 3741:

"The new Federal Aviation Agency would be headed by a civilian administrator with plenary authority to. . .

(a) allocate airspace and control its use by both civil and military aircraft."

It cites a message of the President to Congress on June 13, 1958, in which he recommended the creation of an independent Federal Aviation Agency

"In which would be consolidated among other things all the essential management functions necessary to support the common needs of our civil and military aviation." (U.S. Code and Congressional and Administrative News, supra, page 3742)

The report, under the heading, "Need for Legislation" indicates clearly the intention of Congress to completely regulate this field inasmuch as authority is explicitly given the administrator

". . . to regulate the use of all airspace over the United States by both civil and military aircraft and to establish and operate a unified system of air-traffic control." U.S. Code and Congressional and Administrative News, supra, page 3745)

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The intent of Congress to give the administrator complete authority on the location of runway layout of both civilian and military airports is clearly delineated (Page 3749). It is explicitly stated that the administrator have notice of and control over construction and airport alteration which might interfere with the use of navigable airspace. The Legislative History, (Page 3760), shows that the Chairman of the Committee on Interstate and Foreign Commerce was advised that the enactment of the Bill would be in accord with the program of the President to provide for the regulation and promotion of civilian aviation in such manner as to best foster its development and safety and to provide for the safe and efficient use of the airspace by both civilian and military aircraft. On page 3761, E. R. Quesada, by letter to the Chairman of the Airways Modernization Board advised that the Act as proposed, accomplished in all major respects the plans and objects set forth in the so-called "Curtis Report", of 1957, and that the Curtis Report convincingly revealed that if aviation were to continue to grow in a satisfactory manner, maintaining a high level of safety, certain organizational faults in the federal government required correction.

"The principal organizational need is for a unified Federal aviation agency into which are consolidated all of the essential management functions common to both civil and military aviation. S. 3880 would accomplish this essential need." (Emphasis supplied)

The letter further states that both civilian and military operations will be accomplished under the aegis of the agency and that the legislation is in accordance with the President's program, and that he was authorized to

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state that these views were the official views of the administration.

In a similar letter, Malcolm A. McIntyre, Undersecretary of the Air Force, speaking also for the Department of Defense, pointed out the importance of this legislation and urged

" . . . that the Congress set up at the earliest date a single agency with the broad authority to support common needs of civil and military aviation in the United States and to provide for the safe and efficient use of the airspace, taking into full account the military requirements for national defense and the needs of civil aviation. S. 3880 as referred to your committee, effectively accomplishes these objectives.

S. 3880 represents, in the opinion of the Department of Defense, an excellent balancing of the civil and military interests involved in national aviation, with the objective of achieving effective joint planning and greater safety and efficiency in the use of the airspace. . . ." *idem*, p. 3762.

In support of the conference committee's recommendations on the original Civil Aeronautics Act of 1938, Congressman Schenck, a member of the House Committee on Interstate and Foreign Commerce stated, Vol. 104, Congressional Record, page 17455, as follows:

"This legislation is very necessary . . . and it is important not only for all those who fly and use private, commercial and military aircraft, but it is also very important to all those over whom and over whose property these flights are made." (Emphasis supplied)

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The need for centralized control of navigable air-space for safety and national defense was emphasized also in the original passage of the Civil Aeronautics Act of 1938, at the instance of then Senator Harry S. Truman, (Congressional Record, 75th Congress 3rd Session, Volume 83, Part 6, page 6626, et seq.) At that time, Senator Copeland, a member of the Committee which was chaired by Senator Truman, states on page 6627:

"For a period of two years we studied all matters having to do with air safety and we reached the conclusion that there must be a more centralized organization of all activities involved in aviation in order that the subject may be dealt with in a proper manner."

Senator Truman cites a report of the President's Aviation Commission of 1935 recommending the creation of the Board. At page 6724 he states:

". . . it further recommended that there be no legislative limitation upon the growth of air transportation; that there should be close and continuous Government control of the aids for airlines, that is, the ground items, which make flight safe; that provision should be made to specify economical quality of service; that financial structure of airlines should be supervised and watched over by the governmental agencies; and that there should be a grandfather clause. All these suggestions are included in the pending bill."

Senator Truman, discussing certain proposed amendments to the bill, on page 6728, points out clearly the intention of the bill to preempt the field of air naviga-

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tion in discussing the removal of hazards, and who should pay the costs for such removal. He stated as follows:

" . . . I believe it is unwise for Congress to fore-sake the long established precedent that owners of obstructions to interstate commerce should bear the expense of removing or lighting them. No person may place obstructions in the navigable waters with impunity, so should it be with respect to navigable airspace."

Here the intention is clear that Congress preempted the field under the commerce clause of the Constitution.

From a review of the legislative histories of both the Civil Aeronautics Act of 1938, and the Federal Aviation Act of 1958, and the declaration of policy expressed in each, it is apparent that Congress expressed its intent to preempt the field of the navigable airspace in the United States to the exclusion of the states or local municipalities.

On the issue of preemption or supersession, this Court, in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) held at page 501 as follows:

"Where, as in the instant case, Congress has not stated specifically whether a federal statute has occupied a field in which the States are otherwise free to legislate, different criteria have furnished touchstones for decision. Thus, '[t]his Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance;

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difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.' *Hines v. Davidowitz*, 312 U.S. 52, 67."

The court established three tests of supersession in the *Nelson case*, *supra*, (pages 502-5)

"First, '[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230."

The court examined the Act solely to determine the congressional plan and held that in looking to all of them in the aggregate the

"... conclusion is inescapable that Congress has intended to occupy the field of sedition."

The second test found in the *Nelson case* is that

"... the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230, citing *Hines v. Davidowitz*, *supra*."

The court then held that Congress had treated seditious conduct as a matter of vital national concern, and therefore, it was in no sense a local enforcement problem.

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The final test set forth in the *Nelson* case is that the

"... enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program."

The court further stated at page 509:

"When we were confronted with a like situation in the field of labor-management relations, Mr. Justice Jackson wrote:

'A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.'"

Garner v. Teamsters Union, 346 U.S. 485, 490-491 is cited in support of the above principle.

Although the *Nelson* case concerns criminal law and the application of supersession of federal acts in relation thereto, the tests set forth by this Court are equally apposite to the case at issue. As in the *Nelson* case, the scheme of federal regulation of navigable airspace is so pervasive as to leave no room for the states to supplement it or to be liable for any use of the navigable airspace. Furthermore, the Federal Aviation Act and its predecessor, the Civil Aeronautics Act touched a field in which the federal interest is so dominant that the federal system must preclude any interference by the states or local municipalities. Finally, the enforcement of state or municipal actions concerning aviation would present a serious danger of conflict with the administration of the federal program.

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This Court has frequently held that federal statutes have preempted particular areas to the complete exclusion of the states. See *Rice v. Santa Fe Elevator Corp. et al.*, 331 US 218, (United States Warehouse Act); *Bethlehem Steel Co. et al., v. New York State Labor Relations Board*, 330 U.S. 767, (National Labor Relations Act); *Napier v. Atlantic Coast Line Railroad Company*, 272 U.S. 605, (Federal Locomotive Boiler Inspection Act); *Pennsylvania Railroad Co. v. Public Service Commission*, 250 U.S. 566, (Interstate Commerce Act); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, (Federal regulation of renovated butter); *Savage v. Jones*, 225 U.S. 501, (Federal Food and Drug Act); *Hines v. Davidowitz*, 312 U.S. 52, (Federal Alien Registration Act); *Hill v. Florida*, 325 U.S. 538, (National Labor Relations Act).

In *Pennsylvania Railroad Company v. Public Service Commission*, *supra*; at page 569, Mr. Justice Holmes states:

"The subject-matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority [United States] has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here."

The reasons for holding that federal regulations have preempted the field in the above-cited cases are more cogent when applied to the case *sub judice*. One of the prime purposes of the Federal Aviation Act and its predecessors was to establish and maintain a federal agency with sole power to promulgate such regulations as were necessary, *inter alia*, to provide for strengthened

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military aircraft installations and for efficient air mail service regulation. In these matters, the federal government is the paramount authority. Insofar as civilian and military aircraft operation is concerned, it is the federal agency which prescribes to the minutest detail¹ the patterns of flight, altitude, direction of take off and landing, operational equipment and standards for safety to be met by airports, aircraft and equipment. It is difficult to conceive of legislation more sweeping in scope or which could occupy the field more completely than the federal legislation and regulations concerning air navigation.

The federal legislation and regulations not only control the navigable airspace, but are the source of the rights and privileges of every user of the navigable airspace in the United States. If the County has appropriated an easement in the navigable airspace and is liable in damages therefor, it is inconsistent with the proposition that all rights and privileges to use that which the County "owns" emanates not from the County but from the federal government.

The all inclusive aspects of the federal regulation of air navigation is succinctly set forth in the concurring opinion of Mr. Justice Jackson in the case of *North-West Airlines, Inc., v. State of Minnesota*, 322 U.S. 292, 302-303:

"Aviation has added a new dimension to travel and to our ideas. The ancient idea that landlordism and sovereignty extend from the center of the world to the periphery of the universe has been modified. Today the landowner no more possesses a vertical

1. Mr. Justice Black in his dissent refers to: "Congress' finely tuned national transit mechanism".

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control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be 'owned' to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.

"Students of our legal evolution know how the Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons v. Ogden*, 9 Wheat 1, to *United States v. Appalachian Electric Power Co.*, 311 U.S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to Federal Government alone and not to any state government."

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The regulation and privileges granted by the federal government under the commerce clause of the Constitution precludes State action: (*Cloverleaf Butter Co. v. Patterson, supra*). Since the federal aviation system has preempted the field of navigable airspace in the United States, any taking of property was a taking by the federal government for which it alone is responsible in damages.

II. The United States Government, Which Is a Necessary Party to These Proceedings, Has Not Participated In The Conduct of the Case Before Your Court.

In view of the foregoing discussion, the necessity of the participation of the federal government is clear. When this case, and its companion cases first arose (*Gardner v. Allegheny County*, 382 Pa. 88, (1955)), the question was raised by the County as to whether the federal government and federal agencies and officers were necessary and indispensable parties to the litigation. The Supreme Court of Pennsylvania, in an appeal in equity proceedings which attempted to restrain the flight of aircraft in and out of the Greater Pittsburgh Airport, decided that the United States was not a necessary party. In the *Gardner* case, *supra*, as appears in that decision at 382 Pa. p. 93, the United States Government participated in the appellate proceedings, upon reargument before the Pennsylvania Supreme Court, as *amici curiae*; and in those appellate proceedings, presented its views on what constitutes navigable airspace, contending exactly as it did in the case of *Allegheny Airlines, Inc., et al., v. Village of Cedarhurst, et al., supra*, that the United States had exclusive control over the navigable airspace. However, since the Supreme

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Court of Pennsylvania ruled that the United States was not a necessary and indispensable party, the Government has, since that time, detached itself from this controversy.

7 Because of the dismissal of the contention by the Pennsylvania courts that the United States was a necessary and indispensable party, this contention was never fully raised before the Supreme Court of the United States, and at the oral argument, several of the Justices expressed their concern that the United States Government was not participating in this controversy.

At the original argument of this case, the matter was put on the summary calendar and as a result, the only issue that was presented to the court was the very narrow aspect as to whether the Pennsylvania Supreme Court was correct in holding that the County of Allegheny, as an airport operator, was not liable to the property owner. The question of whether the United States had so preempted the field of air navigation that no other party or body could be liable was never orally argued before this court because it was not then an issue.

Under the Federal Aid for Public Airport Development Act, 49 U.S.C. §§ 1100, 1112(a) 2, the United States has a direct financial interest in the acquisition costs of property in and about the Greater Pittsburgh Airport as recognized in the opinion of March 5, 1962. Furthermore, Congress has explicitly set forth its Declaration of Policy as to the national interest in air navigation not only in 1938, 49 U.S.C. § 402, but also in 1958, 49 U.S.C. § 1302, as follows:

"In the exercise and performance of its powers and duties under this chapter, the Board shall con-

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sider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

• • •

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense; . . .”

It is apparent, therefore, that the United States is a necessary and indispensable party to the controversy—not only because of its direct financial participation in the acquisition of interests in lands in and about the Greater Pittsburgh Airport, but also because of its paramount interest in air commerce, the national defense and the operation of the postal service.

Having taken cognizance of this matter, your Honorable Court should grant a rehearing, at which time parties affected, and particularly the United States Government, should be requested by your Honorable Court to present their views of an issue which vitally concerns air navigation in the United States.

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III. The Decision of March 5, 1962, Is At Variance With the Express Holding In U.S. v. Causby, 328 U.S. 256.

It is submitted that the decision of March 5, 1962 is inconsistent with the holding in *U. S. v. Causby*, 328, U.S. 256. In the *Causby* case, liability was predicated on the fact that aircraft of the United States caused the damage to the claimants. Liability was predicated on the actual operation of the aircraft. The actual operator of the airport, the public body in the same position as the defendant in this case, was the Greensboro Highpoint Authority. It is believed that implicit in the *Causby* opinion enunciated by this Court, is the proposition that the actual operator of the aircraft is liable to a claimant, which decision is inconsistent with the decision in the instant case. *Causby* held at page 267 that the extent of an easement should be determined

"... in terms of frequency of flight, permissible altitude or type of airplane."

The County of Allegheny has contended, *inter alia*, that it is not liable for any damage to the Griggs property because it does not own, operate or control the planes in flight over the Griggs' property;² nor does it operate or control the type of planes or the number of flights over the Griggs property; nor has the County

² Mr. Justice Douglass in the Majority Opinion of March 5, 1962, found:

"No flights were in violation of the regulations of the C.A.A.; nor were any flights lower than necessary for a safe landing or take off."

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any control over the noise characteristics of the planes or the vertical or horizontal fashion of their flight.³

These matters for the most part are controlled by employees of the federal government acting under the broad powers created by the federal system of aviation regulations. Since it is the federal government's employees and regulations which govern the type, number and altitude of flights, as well as their take-off and landing, a change in the federal regulations might, under the decision of March 5, 1962, constitute a condemnation by the County of Allegheny without its knowledge and without any affirmative action on the part of the municipality.

In the majority opinion of March 5, 1962, this Court held:

"We think, however, that respondent, which was the promoter, owner and lessor of the airport, was in these circumstances the one who took the air easement in the Constitutional sense."

Nevertheless, in the *Causby* case, damages were assessed, not against the municipality, Greensboro Highpoint Authority—which was the promoter, owner and lessor, but against the United States, which leased space from the municipality and owned and controlled the flights which caused the damages for which compensation was awarded.

3. If the theory of your Honorable Court is that by the mere laying out of the airport the County is liable, the County respectfully submits that the federal government, and not the County, located and actually paved the runway in question at a time when the airport was a military airport and before it was turned over to the County. Condemnation should be the conscious act, formal or informal, of the entity which will be required to respond in damages for the result of such action. The public body is as much entitled to "due process" as the property owner.

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For the foregoing reasons, it is respectfully submitted that the decision of March 5, 1962, is inconsistent with the decision in the *Causby* case. The interest of national and international aviation require that this apparent inconsistency be resolved so that the liability of the County of Allegheny and others similarly situate, may be determined with some degree of certainty.

CONCLUSION

If, under the authority of the decision of March 5, 1962, the County of Allegheny would attempt to regulate the navigable air space which your Honorable Court held it has "taken" and which it would then "own", and all other airport operators attempted so to act, the result would be the nullification of federal legislation, regulations, supervision and control.

It is respectfully requested, therefore, that the Petition for Rehearing in this case be granted and that other affected parties, and in particular the United States, be invited or directed to present their position to your Court on this vital subject.

MAURICE LOUIK
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Assistant County Solicitor
Attorneys for Petitioner

*Petition for Rehearing.***CERTIFICATION**

I, MAURICE LOUIK, Solicitor for the County of Allegheny, hereby certify that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

MAURICE LOUIK

Solicitor for County of
Allegheny, Petitioner

SUPREME COURT, U. S.
No. 81

Office Supreme Court, U.S.

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JOHN F. DAVIS, CLERK

In The
Supreme Court of the United States

October Term, 1961

THOMAS N. GRIGGS

v.

COUNTY OF ALLEGHENY

*On Writ of Certiorari to the Supreme Court of
Pennsylvania.*

**BRIEF OF COMMONWEALTH OF PENNSYL-
VANIA, BY THE PENNSYLVANIA AERONAU-
TICS COMMISSION, AS AMICUS CURIAE IN
SUPPORT OF PETITION FOR REHEARING BY
COUNTY OF ALLEGHENY**

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1961

Thomas N. Griggs
v.
County of Allegheny

*On Writ of Certiorari to the Supreme Court of
Pennsylvania*

**BRIEF OF COMMONWEALTH OF PENNSYLVANIA,
BY THE PENNSYLVANIA AERONAUTICS
COMMISSION, AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR REHEARING BY COUNTY OF
ALLEGHENY**

THE INTEREST OF YOUR AMICUS

This brief is submitted by the Commonwealth of Pennsylvania in behalf of the Pennsylvania Aeronautics Commission, a State agency charged with responsibility for aeronautical matters within the Commonwealth, under provisions of The Aeronautical Code, the Act of May 25, 1933, P. L. 1001, as amended, 2 P.S. Section 1461.

The Interest of Your Amicus

The Commonwealth joins in the petition of the County of Allegheny, defendant in this matter, for a rehearing and reconsideration of the Court's decision. This request is made primarily for two reasons: (a) The unsettling effect which the decision will have upon Pennsylvania real property law, and (b) The adverse effect upon the Commonwealth's aeronautical safety program.

A. EFFECT UPON PENNSYLVANIA LAW

The Supreme Court of Pennsylvania in *Yoffee, Appellant v. Pennsylvania Power & Light Company*, 385 Pa. 520, 123 A. 2d 636 (1956), ruled that where there is a conflict between the Pennsylvania Civil Aeronautics regulations and the Civil Air regulations, promulgated by the Federal Civil Aeronautics Board, the latter prevail. The question arose in a situation where an aircraft was flying at an altitude permitted by Federal regulations but prohibited by State regulations. The Court of Common Pleas of Dauphin County ruled that the Pennsylvania regulations prevailed. The Pennsylvania Supreme Court reversed this decision, stating at pages 525, 526 that:

"* * * If there were conflicts between the Pennsylvania regulations and the Federal regulations the latter would predominate."

Although the Pennsylvania Court did not discuss this aspect of the case at length, the effect of the decision was to invalidate completely any conflicting regulations of the Pennsylvania Aeronautics Commission dealing with control of the air space, at the same time establishing that such right of control rested with the Federal authorities. This pre-emption question does not appear to have been touched upon in the Pennsylvania Supreme Court's consideration of the *Griggs* case. There, the only consideration was whether the County of Allegheny was liable, and the Court did not pass upon the question of possible Federal pre-emption.

Effect Upon Pennsylvania Law

Since it is a social necessity that responsibility be clearly fixed in the field of air navigation, so that State authorities may intervene for the public protection wherever the Federal arm has not pre-empted the field, it is most important to the Commonwealth that this question of pre-emption be clarified.

B. EFFECT UPON AIR SAFETY

The Commonwealth of Pennsylvania is one of several states which provide tax funds by way of subsidies to local public agencies for the development of aeronautical facilities. The primary purpose is the public safety. The money is spent in large measure for navigational and other facilities designed to prevent accidents. The Allegheny County airport, owned and operated by the defendant herein, is one of the agencies receiving these subsidies. Many other public airports throughout the State likewise receive the benefit of these State funds. In fact, every airport in Pennsylvania which is used by commercial airlines is a beneficiary. Over the years, many millions of dollars have been spent by the State to assist its local communities in providing safe aeronautical facilities.

The present appropriation is \$1,000,000.00, as authorized under provisions of Act 1-A of the Pennsylvania General Assembly, approved March 7, 1962. This appropriation represents 25 per cent of the cost of the local improvements. The local authority contributes an additional 25 per cent and the remaining 50 per cent is furnished by the Federal government. In addition to this, the State Legislature has appropriated to the Pennsylvania Aeronautics Commission the proceeds from the tax collected upon aeronautical fuels sold in Pennsylvania, as provided by Section 17 of the Act of May 21, 1931, as amended, 72 P.S. Section 2611(q). These funds also are used primarily

to assist local communities in airport improvement and air safety. The Commonwealth in addition is an airport owner and operator in its own right of two airline airports, the Harrisburg-York State Airport and the Black Moshannon State Airport, and the owner of an airport at Wellsboro, Pennsylvania. The Commonwealth, therefore, has a direct as well as an indirect interest in the problems created by the Court's decision.

Basically, governmental airport subsidies have been found necessary in order to maintain the facilities required by the nation's aeronautical system. Local communities have been unable to carry this burden by themselves. In most cases, the local communities are already so financially overextended in this field that it is frequently difficult for them even to provide their 25 per cent. sponsor's share of the Federal-State program. It is clear that if they are now to be burdened by additional costs of navigation easements, their ability to maintain proper safety standards will be severely limited. It can be anticipated that local authorities will necessarily call upon State and Federal governments to meet the deficiency. It, therefore, appears that as a practical matter the Federal government will be obliged in any event to carry the lion's share of the burden imposed by the Court's decision.

Apart from such appropriation of air space as may have been intended by the Congress, there is, in effect, a supplemental "pre-emption" by the Pennsylvania General Assembly under the Airport Zoning Law, the Act of April 17, 1945, P. L. 237, 2 P.S. Section 1550. In this respect the State acts in these areas

not subject to Federal regulation, so that there may be no gap in these areas of control. This manifests the legislative intention to exercise governmental dominion over air space entirely apart from any proprietary rights enjoyed by local airports. This is consistent with the legislative purpose to maintain the air space as a free public highway for all citizens.

It is suggested that the reversal of this approach, which is inherent in the Court's decision, creates not only complex and unsettling legal questions but also overwhelming financial problems for local airports. This combination of circumstances could seriously affect aviation safety.

*Conclusion***CONCLUSION**

For these reasons, it is respectfully urged that a rehearing of this matter would be most beneficial, since it would clarify many questions which now remain open as a result of the Court's decision.

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